

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO
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4 In Re:) Docket No. 3:17-BK-3283 (LTS)
5)
6) PROMESA Title III
7 The Financial Oversight and)
8 Management Board for)
9 Puerto Rico,) (Jointly Administered)
10)
11 *as representative of*)
12)
13 The Commonwealth of)
14 Puerto Rico, *et al.*) March 17, 2021
15)
16 Debtors,)
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12 The Financial Oversight and)
13 Management Board for)
14 Puerto Rico,) Docket No. 3:20-AP-00003 (LTS)
15)
16 *as representative of*)
17)
18 The Commonwealth of)
19 Puerto Rico, *et al.*) *in 3:17-BK-3283 (LTS)*
20)
21 Plaintiff,)
22)
23 v.)
24)
25 Ambac Assurance Corporation,)
et al.)
Defendants.)

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3 The Financial Oversight and)
Management Board for)
4 Puerto Rico,) Docket No. 3:20-AP-00004 (LTS)
5 *as representative of*)
6 The Commonwealth of)
Puerto Rico, *et al.*) *in 3:17-BK-3283 (LTS)*
7 Plaintiff,)
8 v.)
9 Ambac Assurance Corporation,))
10 *et al.*)
11 Defendants.)

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14 The Financial Oversight and)
Management Board for)
15 Puerto Rico,) Docket No. 3:20-AP-00005 (LTS)
16 *as representative of*)
17 The Commonwealth of)
Puerto Rico, *et al.*) *in 3:17-BK-3283 (LTS)*
18 Plaintiff,)
19 v.)
20 Ambac Assurance Corporation,))
21 *et al.*)
22 Defendants.)

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HEARING ON MOTIONS

BEFORE THE HONORABLE U.S. MAGISTRATE JUDGE JUDITH GAIL DEIN

UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

ALL PARTIES APPEARING VIA ZOOM

For The Commonwealth
of Puerto Rico, *et al.*: Mr. Michael Firestein, PHV
Mr. Lary Rappaport, PHV
Mr. Colin Kass, PHV

For Puerto Rico Fiscal
Agency and Financial
Advisory Authority: Ms. Elizabeth McKeen, PHV
Ms. Ashley Pavel, PHV

For Financial Guaranty
Insurance Company: Mr. Adam Langley, PHV

For National Public
Finance Guarantee
Corporation: Mr. Robert Berezin, PHV

For Assured Guaranty
Corporation: Mr. William Natbony, PHV

For Ambac Assurance
Corporation: Ms. Atara Miller, PHV

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CAT.

1	I N D E X	
2	WITNESSES:	PAGE
3	None.	
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5	EXHIBITS:	
6	None.	
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San Juan, Puerto Rico

March 17, 2021

At or about 2:30 PM

* * *

THE COURT: Good afternoon, everyone. That is to say, good afternoon and greetings in Boston, Puerto Rico and New York. But I guess I do not know what time it is, so greetings to everybody who is on Zoom and on the phone.

Is everybody ready to start? You're nodding at me. Okay. Why don't we call the case.

COURTROOM DEPUTY: The United States District Court for the District of Puerto Rico is now in session. The Honorable Judge Dein presiding. Today is Wednesday, March 17th, 2021.

In re: The Financial Oversight and Management Board for Puerto Rico, as representative of the Commonwealth of Puerto Rico, versus Ambac Assurance Corporation, et al., case Nos. 17-BK-3283, 20-AP-03, 20-AP-04 and 20-AP-05 will now be heard.

This is a general reminder that all persons granted remote access to the hearing are reminded of the general prohibition against photographing, recording and rebroadcasting of court proceedings. Violation of these prohibitions may result in sanctions, including removal of court-issued media credentials, restricted entry to future

1 | hearings, denial of entry to future hearings, or any other
2 | sanctions deemed necessary by the Court.

3 | Will the parties please identify themselves for the
4 | record?

5 | THE COURT: Why don't we start with Ambac.

6 | MS. MILLER: Good afternoon, Your Honor. Atara
7 | Miller from Milbank on behalf of Ambac Assurance
8 | Corporation.

9 | THE COURT: Assured.

10 | MR. NATBONY: Good afternoon, Your Honor, and
11 | counsel. William Natbony from Cadwalader, Wickersham & Taft
12 | on behalf of the Assured entities.

13 | THE COURT: National.

14 | MR. BEREZIN: Good morning, Your Honor. Good
15 | afternoon I should say. Robert Berezin, Weil, Gotshal &
16 | Manges on behalf of National.

17 | THE COURT: FGIC.

18 | MR. LANGLEY: Good afternoon, Your Honor. Adam
19 | Langley, Butler Snow, on behalf of Financial Guaranty
20 | Insurance Company.

21 | THE COURT: AAFAF.

22 | MS. MCKEEN: Good afternoon, Your Honor. Elizabeth
23 | McKeen of O'Melveny & Myers on behalf of AAFAF, and I'm joined
24 | by my colleague, Ashley Pavel.

25 | THE COURT: And the Oversight Board?

1 MR. FIRESTEIN: From Los Angeles, it's morning, so
2 good morning, Your Honor. Michael Firestein of Proskauer on
3 behalf of the Board, and I'm joined on this call as well by my
4 partners, Lary Rappaport and Colin Kass.

5 THE COURT: Okay. I'm going to ask you all before
6 you speak to identify yourselves again for the record to make
7 the transcript easier.

8 As an opening statement, let me just say I have been
9 through all the papers. There are a lot of papers. I don't
10 see that there's a general prohibition against any specific
11 type of discovery, so I don't think that there is a blanket
12 prohibition against e-mails or against audit-related papers
13 and work materials. So I don't really want to hear that
14 argument. But I do think that the discovery that was
15 authorized is very targeted. And the words used were used
16 carefully in drafting what the allowable discovery is.

17 So I'm going to ask you to link your argument to the
18 specific request, because I think that's the only way that we
19 can give effect to the very specific order. And I also think
20 it makes sense for us to do it in the order in the papers. So
21 we'll start with PRIFA. We'll finish that, and then we'll
22 move on to the next one. Okay?

23 All right. Who's going to start?

24 MS. MILLER: I will, Your Honor. Atara Miller from
25 Milbank, LLP, for the record.

1 So I appreciate, you know -- I guess I wanted to
2 start by noting that we're in a really different place now
3 than we were a year ago, not only because I actually had to
4 leave Puerto Rico early, and I missed the last hearing on
5 revenue bonds, because my children were quarantined in the
6 first school that got shut down with COVID. And so a year has
7 changed a lot, but it also puts us in a very different posture
8 in these cases.

9 You know, as we all know, there has been extensive
10 briefing and argument that -- before Judge Swain on the
11 revenue bond issues. And after considering it for six months,
12 Judge Swain identified specific topics. And we would agree
13 with you, they were quite carefully crafted to identify those
14 areas where she thought that material, relevant information
15 was necessary to fill out the record before her.

16 You know, one thing that I just want to say is that
17 Judge Swain could have just issued an order directing
18 production of particular materials, but she didn't. She
19 identified topics, and then directed defendants to propound
20 discovery directed to such topics.

21 So while I think it is true, and we did in our
22 papers, in our discovery request, hew very closely to the
23 specific language that she used, I don't think that that is
24 necessarily the end point of the discussion. I think we need
25 to understand what discovery directed to that topic means.

1 And I appreciate Your Honor's comments, and so I was
2 going to do some table setting, and then talk about PRIFA and
3 CCDA, and then pass to Mr. Natbony. And I appreciate that
4 you've eliminated my first two points that I'll just skip
5 over, and we'll get into the specifics of them in terms of
6 e-mail and audit reports.

7 There's one other blanket -- just blanket refusal to
8 provide any information that I do think is worth putting out,
9 because I think it's going to inform, to some extent, some of
10 the -- whether we're able to craft requests that go to audit
11 materials and, in particular, e-mails. And that is we are --
12 and, frankly, I'm scratching my head at this, but we are
13 continually faced with a refusal to identify the people with
14 relevant knowledge about these topics.

15 We asked for it. They said no. We served an
16 interrogatory. They said no. We asked for it in a meet and
17 confer, whether they would consider telling us who the
18 relevant custodians are. They said no. They sent us a letter
19 again last night confirming that their answer is an
20 unequivocal no.

21 You know, why -- the reason why I'm scratching my
22 head is because there's so much in their papers that accuses
23 us of dilatory tactics, of just looking for delay, just
24 looking to add burden; and it would seem to me that the most
25 efficient way to identify relevant information is to identify

1 who the key people are, look through their e-mails or look
2 through their documents.

3 And with respect to depositions, it seems like
4 they're going to force us to jump through the hoop of taking a
5 30(b)(6) deposition to find out who the relevant people are,
6 and then notice their depositions. And I think, you know, the
7 government has said often that there has been turn over, and
8 we acknowledge that. And so we may be talking about the key
9 people may no longer be with the government. And, you know,
10 we need time to find them, to serve them with process, and to
11 get the information that we need.

12 And, you know, there's some discussion, and we'll get
13 into this when we talk about CCDA, but I just note that what
14 we're coming up with when we're putting it all -- I suspect
15 that the government's answer is: Well, they'll get a
16 30(b)(6). We told them we're going to give them a 30(b)(6),
17 and they'll get a 30(b)(6), and why do they need anybody
18 else's information.

19 And, first of all, without going into too much detail
20 about the information and testimony that we got from the last
21 30(b)(6), I think it's absolutely clear that a 30(b)(6) is not
22 going to cut it here. And what's happening and what's evident
23 is that to the extent there is a gap in the documents, the
24 30(b)(6) they're putting up is a Title III consultant that
25 they brought in. So a consultant that was hired during the

1 restructuring process who doesn't actually know anything.

2 And so they are essentially taking legal positions,
3 or suppositions and speculation, and, you know, brushing it
4 with the veneer of a factual assertion. That doesn't work.
5 And so I just -- I want to put that on the radar, also,
6 because I think that's a critical issue that we need to
7 resolve during this hearing. And it's obviously going to
8 relate directly to e-mail searches and what a reasonable scope
9 of that might be, also.

10 So with that --

11 THE COURT: While you're doing that, though, would
12 you just address for me what your understanding is of this
13 file that they are looking at, the central file? As to that
14 --

15 MS. MILLER: So I have that in my notes. I actually
16 have no idea, and they won't tell us what the central
17 repository is. And they -- you know, with respect to PRIFA,
18 you'll see in some of their responses, there'll be a response
19 from AAFAF that says, with respect to documents about the
20 nature of the Infrastructure Fund, they'll say AAFAF said --
21 AAFAF's response is, we looked through the central repository
22 and we didn't find any information. And then with PRIFA, they
23 say, well, PRIFA's going to look through its central
24 repository.

25 I don't even have a firm understanding of whether

1 | there is a central repository of documents, or whether each
2 | entity has its own central repository of documents, and what
3 | information is uploaded. So people I work with laugh at me in
4 | part because I refer to our document management system by the
5 | name of our two systems ago, and I'm totally incompetent when
6 | it comes to it. And I can tell you if you're looking for a
7 | document that I have ever touched, you're not going to find it
8 | there, unless I sent it to someone else and they uploaded it.

9 | And I suspect that if we're looking to documents that
10 | date back to, you know, the early aughts, they're not going to
11 | find everything consistently uploaded. And one thing that I
12 | think has become abundantly clear throughout this is that
13 | Puerto Rico Government entities do not have the most
14 | organized, complete, and comprehensive records. And so the
15 | notion that they're trying to convince us that everything is
16 | sort of miraculously going to be in this central repository,
17 | and if it's not there, well, we're just not going to look
18 | farther, is just not satisfying to me.

19 | So that's probably, Your Honor, frankly, a better
20 | question for Ms. McKeen, because she probably has an
21 | understanding. So I'm happy to pause if you want that before
22 | we move on or --

23 | THE COURT: No, I think move on and then we'll -- I'm
24 | assuming that the government entities will address both of
25 | your points on what hasn't been produced as a general

1 category.

2 MS. MILLER: Okay. So I wanted to turn, I guess,
3 specifically now to PRIFA. And I think, you know, if you look
4 at the revised proposed order that we submitted, we have tried
5 to really narrow the discovery requests to two main topics:
6 Firstly, the nature and location of the Infrastructure Fund;
7 and then, second, the discovery related to the accounting
8 treatment of the rum tax remittances in general, including the
9 use and purpose of account designations, fund codes, and
10 department IDs. Those are Judge Swain's two topics, or two of
11 Judge Swain's topics.

12 And I don't think there's any dispute that what the
13 Infrastructure Fund is is a core question in this litigation.
14 And what we keep hearing back in response to the question is
15 citation to statutes and bond documents, but, frankly, if that
16 were enough, we wouldn't have an order directing discovery on
17 it. So, clearly, Judge Swain is imagining that we would get
18 something else.

19 And I hear, and I'm sympathetic to the government's
20 position that says, well, there just isn't anything else, but
21 I have a hard time accepting that when you won't even search
22 for it. And if there isn't anything else, it doesn't seem
23 particularly burdensome to go to the e-mail servers, to go to
24 the document servers, and search for "infrastructure fund."
25 And if you get zero hits, you get zero hits. And then there's

1 nothing to even look through. And --

2 THE COURT: Isn't the government saying what's the
3 first 117 million, and this is where it goes, and this is --
4 we are giving you that information? Is that still disputed?

5 MS. MILLER: Well, I think it is, because I'm
6 actually not sure that they say that it's the first 117
7 million, period, full stop. That was definitely the testimony
8 that we got in the 30(b)(6) deposition, but now, in the
9 interrogatory responses, they say it is the first 117 million
10 that was historically allocated to or transferred to PRIFA.
11 And what I think they're saying there is not that "was
12 historically transferred to PRIFA" is sort of an added
13 descriptor, but is actually I think, in the way they're
14 presenting it, defining, definitional of the Infrastructure
15 Fund.

16 So what is the Infrastructure Fund? It is 117
17 million that goes to PRIFA, as opposed to our position, which
18 is it's the first 117 million, whether it's sitting in the
19 Commonwealth TSA, or whether it's sitting in a PRIFA bank
20 account. It is being held on behalf of PRIFA by the
21 Commonwealth, because that is the Infrastructure Fund, and the
22 Infrastructure Fund is by statute PRIFA's property.

23 And that is exactly the rub, right? Like, does it
24 have to -- do they have to do something else? Did the
25 Infrastructure Fund no longer exist, for example, if they're

1 not transferring the money to PRIFA?

2 THE COURT: Okay.

3 MS. MILLER: So, you know, we would agree, and if
4 they're going to concede that it's the first 117 million no
5 matter where that's held, that is the Infrastructure Fund,
6 then we'll take a stipulation to that effect, and we'll bypass
7 all of this discovery.

8 You know, in that regard, I think with respect to
9 this question, this is another example where a blanket refusal
10 to produce any audit-related materials is, frankly,
11 nonsensical. It is -- it is certainly one of the most
12 targeted and direct potential sources of information that you
13 can get.

14 It is, as the courts have recognized, you know, a
15 very defined and limited set of information. There's
16 discussion about a PRIFA Special Revenue Fund. We can debate
17 whether that is the Infrastructure Fund, whether it is not the
18 Infrastructure Fund, but there's clearly discussion in the
19 audited financials about 117 million and restrictions on that
20 money. And that should be produced.

21 That is directly relevant both to the nature and
22 location of the Infrastructure Fund, and also to the second
23 category of documents or the second topic Judge Swain
24 identified of discovery relating to the accounting treatment
25 of the rum tax remittances.

1 So I just -- you know, again, it seems like we're
2 trying to be conscious and to not force duplicated efforts.
3 We try to think carefully about, you know, where do we think
4 rationally, instead of going through a whole mess -- how can
5 you target it, just look for this information. It seems like
6 the public disclosures about it, that would be a really good
7 and easy place to look to see what information is there.

8 THE COURT: Okay.

9 MS. MILLER: So I think, I mean --

10 THE COURT: Just address -- I mean, what the
11 government is saying, as I understand it, though, is that they
12 are providing the information which shows the rum tax
13 remittances and where it goes.

14 MS. MILLER: So what they are showing is -- what they
15 have agreed to produce is the flow, so where the cash goes.
16 And they've agreed to produce the accounting designations. So
17 how's it getting tagged within the accounting system, and
18 they're going to run a report out of the accounting system.

19 So all of that is really helpful and necessary, but
20 it's not everything. There's another piece of it, which Judge
21 Swain identified, which is not just the use of the accounting
22 designations, but the purpose of the accounting designations.
23 What does this mean? Why are they being tagged in that way?
24 Why are they being used like that?

25 And the government hasn't proposed any scope that

1 would address the "why," right. They are willing, and I
2 acknowledge, right, they are willing to give us more about the
3 "what" or the "how," but nothing about the "why." And, you
4 know, they say, well, we said we'd give you policies and
5 procedures. Okay. My personal view, I haven't seen all the
6 policies and procedures, but based on the ones that I've seen,
7 I don't think it's going to go to the "why."

8 But I also -- to your point at the outset that these
9 were carefully crafted topics, that we should be, you know,
10 really analyzing, because they are meaningful in how they're
11 drafted, Judge Swain has a totally separate topic for policies
12 and procedures. So if she had intended policies and
13 procedures to be the be-all and end-all of documents that go
14 to the purpose of the accounting designations related to the
15 rum tax remittances, shouldn't have included that in the other
16 topic, right?

17 So, you know, clearly I think there's something more,
18 and there's just a refusal to give it to me. I'm not exactly
19 sure what to say.

20 You know, the other piece which seems like a small
21 one, but I think is going to be relevant certainly in some
22 spaces, and we're not suggesting that we need, you know, the,
23 you know, A to Z tagging of the flow for every single rum tax
24 dollar ever collected by the Commonwealth, but the government
25 is and continues to arbitrarily narrow and limit their

1 responses only to the first 117 million, and not to the rum
2 tax remittances, which, as Judge Swain used it, refers to the
3 full amount of the rum taxes collected. So --

4 THE COURT: But isn't that what we did exemplars on?

5 MS. MILLER: We did exemplars on the 117, and we did
6 some exemplars on the other piece. But what they haven't
7 agreed to produce now, for example, are accounting logs and
8 policies related to, let's say, the next five million, which
9 gets deposited into the TSA, but everybody acknowledges is
10 held in trust.

11 And one of the arguments that we made in the 56(d)
12 declaration was that it is useful for the Court, if they're
13 going to argue that these monies are -- one of their arguments
14 is the Commonwealth knows how to make a trust if they want to,
15 and they know how to hold things in trust. And one of our
16 arguments was, well, these are accounted for. They're all
17 deposited in the same TSA account. And the way you
18 distinguish that is through your accounting designation. That
19 seems relevant.

20 And so the scope is rum tax remittances, and I just
21 want to make sure that we're not limiting it only to the 117
22 million. If we're going to get extracts and reports from the
23 PRIFAS system, it should address the full rum tax -- the full
24 rum excise taxes, not just the first 117 million.

25 THE COURT: Okay.

1 MS. MILLER: So I'm not looking -- to your point,
2 Judge Dein, we're not looking to fill out that full body of
3 exemplars. I'm not looking for every single transmittal
4 voucher. I'm not looking for every single entry. But I would
5 like the report that shows it. I would like the policies or
6 procedures that address the remainder of the rum excise taxes.

7 THE COURT: I'm sorry. That was -- can you hear me
8 now? There was a bit of a freeze there, no matter how many
9 times we've tested this.

10 All right. So I got you through there was -- you're
11 not looking to fill out all the exemplars, but you are saying
12 that through the PRIFAS -- to the extent that there are
13 printouts about the flow, you want it beyond the 117 million?

14 MS. MILLER: Right. And also to the extent that
15 there are policies or procedures that govern the balance of
16 the rum taxes, we would want those as well.

17 THE COURT: Okay. The other -- one other question,
18 and then I'll let the government respond. But do you have any
19 communications with KPMG?

20 MS. MILLER: So we subpoenaed KPMG, and not
21 surprisingly their answer was -- oh, have we had communication
22 or have they produced communications?

23 THE COURT: Have they produced communications?

24 MS. MILLER: The answer is no. And KPMG has said
25 they won't produce until after this hearing, understandably.

1 THE COURT: Okay. So is it your understanding,
2 though, that KPMG is the accounting firm that the Commonwealth
3 would have been communicating with to account for this fund,
4 for the rum tax fund, the rum tax remittances?

5 MS. MILLER: That is our understanding.

6 THE COURT: Okay. Who's -- I'm assuming you're
7 taking the lead on the defendants on this. Do any of the
8 other defendants want to add anything?

9 MR. LANGLEY: Yes, Your Honor. This is Adam Langley
10 on behalf of FGIC. I was going to discuss one of the nuance
11 issues on the accounting side of this that I think is
12 important for the Court to understand.

13 So we went through an extensive exemplar process, as
14 you identified, regarding bank accounts and the lift stay
15 discovery, but I think the defendants here are asserting a
16 different basis. And we are asserting that there is a
17 separate set of accounts called fund accounts that are
18 specific accounting designations that relate to bank accounts,
19 but really is a separate control.

20 And that's really where I think the focus of our
21 discovery is in this later stage, is not trying to recreate
22 the exemplars on bank accounts, but to understand how moneys
23 were collected, what they -- was done in that internal fund
24 accounting management system, and how were they expended,
25 where did they go. And the bank accounts don't tell us those

1 type of answers.

2 And the way I kind of characterize it is we think of
3 a two-factor authentication system. So when I order something
4 off of Amazon, a book, I'm going to put in a password for my
5 log-in, and then it's going to send me a link to get the phone
6 and put in a passcode. There's a dual system in place. And
7 that's how bank accounts and fund accounts work for
8 governmental entities.

9 The bank account does hold the deposit, but they're
10 tracked, they're segregated, they're controlled, all through
11 fund accounting. I think that's clearly what Judge Swain was
12 getting at here when she talked about topics two, four, five,
13 six and seven that gets to the accounting treatment in
14 general, that talks about outflows and inflows of the
15 Infrastructure Fund.

16 And I think that's where we're having this principal
17 dispute here is they keep telling us that they're going to
18 produce bank account statements and bank account flow of
19 funds, and we're seeking something completely different.
20 We're seeking special fund flows and how the monies flow
21 through the accounting systems and the physical control
22 systems that the Commonwealth maintains.

23 And we expect these to be fairly sophisticated
24 systems for controlling monies, because the Commonwealth has
25 represented in their financial statements that they maintain

1 | these systems and they maintain these controls. But we've
2 | been denied any access to that. In fact, they footnote at --
3 | footnote eight of their response indicated that the lift stay
4 | litigation did not include any of the fund accounting. It did
5 | not include any of the production that we are seeking here on
6 | this fund accounting documentation.

7 | So we do think there's a need for a second set of
8 | exemplars, and a full accounting for -- and the controls. Who
9 | received this money? Who put the designation on the money?
10 | Who transferred it? Was there a management at Treasury that
11 | caused that transfer to be initiated?

12 | There should be fundamental controls put in place in
13 | any accounting system that we should be able to get easy
14 | access to, but we've been denied that access to all. So I
15 | think that's very important.

16 | And I think, Your Honor -- I don't want to get too
17 | far in the audit issue, because you said we're going to be
18 | able to do some of that in discovery, but I do think the audit
19 | is helpful, because it points us in a clear direction of where
20 | those controls are, how are these monies managed, because they
21 | have been tested on a regular basis, they've been reported in
22 | financial statements and observed.

23 | And we do know that auditors obtain audit evidence.
24 | They have to maintain that audit evidence for seven years
25 | under federal law. And so that is a readily, easily

1 identifiable body of research and audit evidence that should
2 point us to the clear controls to the special funds that are
3 at stake.

4 And we actually would even assert that the statutes
5 that we're dealing with aren't talking of bank accounts.
6 They're talking the Infrastructure Fund, which is a special
7 revenue fund in the financial statements. So that's I
8 think --

9 THE COURT: I think that -- let me hear from the
10 government, because I think the discovery was targeted at
11 identifying the nature and location of the Infrastructure
12 Fund. And I think what I'm going to hear is the only reason
13 you're getting bank account information is because you're also
14 getting information that indicates where the money came into,
15 and the money came into those bank accounts. If I'm -- now I
16 should stop talking about accounting and let the government
17 respond.

18 MR. LANGLEY: I would agree with you. Real quick, we
19 agree that it goes into bank accounts, but we assert the
20 control mechanism that's talked about in the statute is the
21 fund account that layers onto this, the two -- second layer
22 authentication we have to add.

23 So you have to see where it goes in the bank account,
24 and then how it's controlled from a fund accounting
25 perspective. Those two layered together is what we assert is

1 how you identify the Infrastructure Fund.

2 THE COURT: Thank you.

3 MR. NATBONY: Your Honor, William Natbony from
4 Assured.

5 Not to get ahead of ourselves, but all the arguments
6 that Mr. Langley has made and we've heard may apply equally
7 and should be kept in mind when we get to HTA, because there
8 you have another special revenue fund, meaning Fund 278. But
9 I'll hold, and we'll deal with that at the appropriate time,
10 with Your Honor's permission.

11 THE COURT: Thank you.

12 Okay. Who's responding?

13 MS. MCKEEN: Your Honor, this is Elizabeth McKeen on
14 behalf of AAFAF. I will take the lead in responding.

15 I'd like to start, as Ms. Miller did, by making some
16 sort of overarching and general observations. And then I'd
17 also ask my colleague, Ms. Pavel, to address with granularity
18 the PRIFA specific requests because I think it's helpful not
19 only to address some of the overarching points that have been
20 discussed, but I think, as Your Honor suggested, it will be
21 helpful to focus on the specific requests, because when we do
22 that, I think it will be clearer that the government parties
23 are satisfying their obligations and intend to satisfy their
24 obligations here.

25 You know, I am struck by the extent to which I've

1 heard from both Ms. Miller and Mr. Langley that they need
2 certain things that, in fact, we've agreed to produce. So I
3 think a lot of what's going on here in the papers and today is
4 based, frankly, on either a mischaracterization or a
5 misunderstanding of what the government parties are actually
6 doing.

7 So with that, you know, as Your Honor referenced,
8 Judge Swain was very clear in her order that the discovery she
9 was permitting should be limited, should be targeted, should
10 be proportional and efficient. And we actually agree with
11 what you said at the beginning of the hearing. There's no
12 blanket prohibition on e-mails or on any particular kinds of
13 documents.

14 The approach we're taking is to look at each request
15 and figure out what makes sense with respect to that request.
16 What is the limited, targeted, proportional and efficient way
17 of providing information, providing documents that corresponds
18 to the subject matter?

19 I would say on the flip side of that, we think
20 defendants have completely flouted Judge Swain's directive,
21 and they have propounded shockingly overbroad and burdensome
22 discovery, not only on the government parties, but also on
23 third-party law firms, accountants, banks, and rum producers.

24 And I'm actually glad the subject of the KPMG
25 subpoena came up. That's obviously not before the Court

1 today, much like the interrogatories that Ms. Miller brought
2 up also are not before the Court, but that's a particularly
3 illustrative example of the overreach that's going on here.

4 They say they tried to think carefully about how to
5 focus their discovery, but they've asked KPMG, who's
6 responsible for auditing the Commonwealth's financial
7 statements, as just one of their requests, to produce all
8 documents and communications concerning Treasury's accounting
9 practices, including the use of fund accounting, GAAP, and
10 GASB principles.

11 That is in no way limited, targeted, proportional or
12 efficient. And I hope it doesn't actually reflect careful
13 thought, because that's not what it seems like to us.
14 Defendants have not taken it upon themselves to limit what
15 they're asking for, and it has forced the government to go
16 topic by topic and to figure out, okay, what's actually
17 targeted and efficient here.

18 And we've done that. We have undertaken significant
19 efforts to find new documents and information that were not
20 previously the subject of discovery during the lift stay phase
21 of this proceeding. We've interviewed at least 20 government
22 personnel. And since the 56(d) order, we have produced
23 thousands of additional documents.

24 Those documents include documents mapping all
25 Commonwealth revenue sources to the fund numbers that were

1 utilized for expenses. This includes mapping for Fund 278,
2 which is revenues that were allocated to HTA. I know we're
3 talking about PRIFA, so it includes revenue account code
4 R4220, which includes the first 117 million dollars in rum tax
5 remittances that were previously allocated to PRIFA.

6 Our export of PRIFA related information, by the way,
7 is not limited to the first 117 million dollars. So I think
8 that speaks to the issue that Ms. Miller raised. We're
9 producing bound volumes of documents --

10 THE COURT: Bear with me for a second, though. Is
11 there a dispute as to the significance of the first 117
12 million? I mean, is this an issue -- is this a factual issue
13 that's still in dispute?

14 Ms. Miller seems to think you're distinguishing
15 between 117 million that goes to PRIFA and the first 117
16 million.

17 MS. MCKEEN: So I think that -- I suppose my response
18 to that is while I understand the point Ms. Miller was trying
19 to make, I'm not sure how she thinks some e-mails are going to
20 shed any light on that. I think if the parties want to talk
21 about whether the Infrastructure Fund is -- you know,
22 continues to exist in the form of the first 117 million
23 dollars, I think that's a legal argument. I don't see how an
24 e-mail on that subject is going to inform anything.

25 THE COURT: So it is still an issue, though, that's

1 in dispute, or subject to discussion?

2 MS. MCKEEN: So I don't want to speak out of school
3 on that, Your Honor. And I'd like to defer to counsel for the
4 Board on that to make sure that they are addressing that
5 issue.

6 THE COURT: Well, unless somebody's comfortable in
7 telling me it's not an issue, we'll just assume it is for
8 today's purposes.

9 MS. MCKEEN: I think that's fair, Your Honor. And I
10 think the point I would make there is just that that's not the
11 kind of dispute that's going to be resolved by a one-off
12 e-mail that somebody sent somebody else.

13 In addition to producing that information, we're
14 producing bound volumes for additional PRIFA Rum Bond
15 issuances. These include resolutions and agreements that were
16 not included in the materials produced in the lift stay. We
17 are producing additional bank account statements. We're
18 producing documents from GDB's system.

19 And we're not done. Those are materials we've
20 already produced. We have another month to complete our
21 production. We're preparing a data export from PRIFAS, which
22 is the Commonwealth's accounting system. It's going to
23 include all transactions from 2014 to the present that involve
24 revenue account code 4220, and that encompasses that first 117
25 million dollars of rum tax remittances. It also includes

1 expense code E6120, which appeared on some of the vouchers
2 from transfers of rum tax remittances.

3 We're also working really closely with all these
4 entities to locate other categories of documents that we have
5 agreed to produce. We have agreed to produce GASB 54 fund
6 accounting statements as the defendants have requested. We
7 said we'll produce bound volumes for earlier rum bonds. We'll
8 produce resolutions. We'll produce supplemental agreements.
9 We've agreed to produce vouchers and transfer letters, as well
10 as policy and procedure documents that were not at issue in
11 the Lift Stay.

12 So to the extent the motion, the reply, try to
13 characterize it as though we're refusing to do anything beyond
14 what we already did in the lift stay proceeding or just
15 looking in the same places we looked before, that's just not
16 true. There are really only two categories of things where
17 we've tried to draw the line, and one of them is this concept
18 of an e-mail search where we'll be asking an IT department to
19 pull someone's entire PST file and run searches against it.
20 We don't think that's the targeted, efficient, proportional
21 way to go here, because what we've actually done is we've
22 spoken to people to ask them where the relevant documents and
23 information are likely to be.

24 And we haven't limited what the answer to that might
25 be. If somebody tells us, hey, this thing you've asked me

1 for, it's in my e-mail, our response is: Great. Please go
2 get it and give it to us. It's not that we're saying e-mails
3 are sort of categorically out of bounds. What we're saying is
4 we want to search e-mails when we get told by the relevant
5 people that have knowledge that that's where these things are
6 likely to be.

7 We don't want to go off and do the, you know, find a
8 dozen custodians and do a bunch of search terms type of
9 search, because that is not the targeted or efficient thing to
10 do here. But this idea that we sort of have blinders on and
11 we're only looking in one place for documents just isn't the
12 case.

13 When we have spoken to people in an effort to comply
14 with the Court's order, we're going subject by subject and
15 saying, what do you have; where is it; can you get it for us;
16 not only look in some central repository. So to the extent
17 there's confusion on that issue, I'd like to clear it up.

18 THE COURT: Well, I think there is confusion, and I
19 think -- I'm trying to figure out a way to get a comfort level
20 on both sides that the right sources are being reviewed,
21 because that's clearly one of -- that's a theme that runs
22 through all of the papers, you know, where are you looking,
23 and is there this central repository, which is the finite
24 limit of -- the finite limit of your search.

25 So, and then Ms. Miller says, but when we ask you who

1 are the people with knowledge, that's not something you're
2 prepared to answer.

3 MS. MCKEEN: I think that --

4 THE COURT: How can we get that information shared
5 among the groups here? Because I think there are a lot of
6 papers here, and I think the defendants have a right to have
7 at least some understanding as to the scope of searches that
8 are being done.

9 You can do it formally; you can do it informally; but
10 it's an appropriate question.

11 MS. MCKEEN: I agree, Your Honor, and I think what
12 you're suggesting makes a lot of sense. If it would be
13 helpful and provide some transparency, we can provide
14 information about, you know, where specifically have we gone,
15 what files have been searched as to each instrumentality.
16 That's absolutely information we can provide, and indeed,
17 would be happy to provide, because we think those searches
18 have been comprehensive and meaningful. So it's not that
19 we're refusing to provide that information.

20 I think on the subject of the interrogatory that
21 Ms. Miller raised, you know, defendants had suggested that the
22 parties exchange initial disclosures in connection with this
23 proceeding, and we rejected that idea. We didn't think it
24 made sense or was efficient here. And they propounded some
25 interrogatories on us, but didn't actually call for the

1 information that Ms. Miller described.

2 They then sought this information in a meet and
3 confer, and we said, look, we don't think it makes sense for
4 you to turn this interrogatory into an initial disclosure
5 process. We think that's not efficient. And in particular,
6 some of what they had requested was, you know, anybody that
7 has information or knowledge about, and then would identify a
8 subject matter that's extremely broad.

9 And so the idea that the Commonwealth, you know, in
10 this situation where we're supposed to be targeted and
11 efficient, should be coming up with lists of dozens of people
12 who might at some point in time years past have been
13 associated with the process, that's one way you could do this.
14 It's not the targeted way. It's not the efficient way. It's
15 not the proportional way.

16 And so I think what's important to keep in mind here
17 is that for some of the subject matters that the Court said
18 were fair game here, for some of them the answer is we should
19 produce documents; but for others, the answer is if you want
20 to know, for example, the purpose of a particular aspect of
21 fund accounting, the way to find out that isn't to paw through
22 a bunch of e-mails. It's to ask one of the people who knows,
23 hey, what's the purpose of this.

24 So, yes, for some of these things, deposition
25 testimony may be appropriate.

1 THE COURT: But how would they know who to ask?

2 MS. MCKEEN: Well, they'll presumably serve us with
3 an extremely broad 30(b)(6) deposition notice. At least
4 that's what I anticipate will happen. So we will need to go,
5 as we did in the lift stay, and identify a witness who will be
6 able to speak competently on that issue in a way that binds
7 the relevant instrumentalities and the Commonwealth.

8 THE COURT: Well, I think a 30(b)(6) certainly has
9 its role, but it is certainly a step removed from somebody who
10 has the personal knowledge of having done it.

11 MS. MCKEEN: Well, I guess in this instance I'm not
12 sure if I agree with that, only because while it's true that
13 they are in some cases a step removed, because we are talking
14 about things that happened with respect to different processes
15 over many years, I think the advantage of a 30(b)(6)
16 deposition is that then it is incumbent upon the party being
17 deposed, on the party giving that testimony, to educate its
18 witness so that if that person may not have personal
19 knowledge, they need to go out and find the people that do and
20 educate themselves. And that is actually a more efficient or
21 can be a more efficient process than taking the depositions of
22 the three, four, five people who may have held the right job
23 at the right time.

24 So I definitely think that the idea that the way to
25 be targeted and efficient here is to be taking testimony of

1 people who have personal knowledge about something, that could
2 get us way off track. And I would suggest that 30(b)(6)
3 testimony will be much more appropriate, as it was in the lift
4 stay.

5 THE COURT: Address for me why -- I understand the
6 concern about e-mails, but the blanket objection, I'm not
7 saying I agree with all of it, but I do think that in most
8 cases, e-mails serve different purposes. But it does seem to
9 me that a number of these categories do call out for some type
10 of accounting documents, and I'm not sure why that was
11 included in your objection, you know, to produce -- you know,
12 I think you wrote there were two types of documents that
13 shouldn't have to be produced, right? One of which was
14 accounting documents or audit documents.

15 It seems to me that if there is an auditor addressing
16 these accounts or these flows of money, that that would be the
17 file that would include any relevant e-mail instructions or --
18 I mean, the auditors have to document this, right? So it
19 seems to me that that's an easier way to go.

20 MS. MCKEEN: Well, so, I think you actually, in sort
21 of grappling with this issue, hit upon an important
22 distinction, which is sort of the distinction between
23 accounting on the one hand and auditing on the other. So we
24 are producing accounting related materials. For example, this
25 PRIFAS export that I'm talking about. That's going to show

1 how this fund accounting was used in practice.

2 So it's not that we are saying, you can't have any
3 accounting related materials. What we're saying is, you don't
4 need the back and forth between us and our auditor to get at
5 the underlying accounting, how things were treated, because
6 we've agreed to give you things that will reflect how they
7 were treated, how fund accounting was used and practiced. So,
8 again, it's about trying to be targeted and efficient.

9 As far as the audit materials go, you know, I do
10 think it's noteworthy that that was something that they asked
11 Judge Swain to give them in their Rule 56(d) declarations, and
12 she left it out. And they've argued, well, she didn't really
13 leave it out, because --

14 THE COURT: I'm not reading it that way. I mean, I
15 think I'm reading the order as Judge Swain not doing the
16 discovery. So, you know --

17 MS. MCKEEN: Well --

18 THE COURT: -- I think that's why it's by topics, and
19 if audit material is responsive, I don't think she said,
20 because I didn't allow it as a specific category, that it's
21 precluded. I think --

22 MS. MCKEEN: Well --

23 THE COURT: -- it --

24 MS. MCKEEN: I'm sorry. I didn't mean to interrupt
25 you.

1 THE COURT: No. I'm repeating myself.

2 MS. MCKEEN: So here's all I'll say about that. I
3 think it's important to note that in their 56(d) declaration,
4 in the context in which they ask for the audit papers, it
5 wasn't with respect to any of the topics that are at issue
6 today. It was in the context of the clawback-related
7 discovery where Judge Swain did not grant their request.

8 With respect to the topics that became part of her
9 order, again, I think the main point is that -- not that there
10 wouldn't conceivably be some way to shoehorn audit-related
11 materials into one of these topics, right? I'm sure you could
12 do that. That's what they're doing.

13 I think our point, though, is that's not what's
14 targeted, and that's not what's efficient, because of the
15 accounting related materials that we've already agreed to
16 provide. And because we are giving them that core set of
17 materials, this other back and forth with auditors just isn't
18 targeted. It's not necessary. And we think it's going to be
19 a fishing expedition that's only going to drag things out.

20 So if the question is what is the targeted,
21 proportional thing to do, we're doing that.

22 THE COURT: But isn't the audit materials a more
23 finite world?

24 MS. MCKEEN: No, I don't believe it is. And in
25 particular, I think it's important in that context to

1 appreciate the fact that the Commonwealth is still working
2 very hard with KPMG to complete audited financials for the
3 last several years.

4 And I think the idea, if we start getting into that
5 process, and, in particular, subpoenaing KPMG for all
6 documents and communications about the Commonwealth's use of
7 fund accounting, that the disruption that that will cause to
8 the Commonwealth's ongoing procedures of getting its financial
9 statements audited would be completely disproportionate to any
10 marginal value that kind of material might have when we're
11 already giving them the underlying accounting materials.

12 So I think, yes, those are materials that exist in
13 the universe; but given the disruption it would cause to go
14 off and look for them on the one hand, and all the other
15 things that we are providing on the other hand, I think it
16 would be a mistake to go down that road. It would be
17 burdensome, expensive and time-consuming. And we just don't
18 think it's necessary in light of what we're already doing.

19 THE COURT: Is that your position, though, if they
20 target it to a specific account? Is it the same burden?

21 MS. MCKEEN: Well --

22 THE COURT: If they identify, for example, I know
23 that you -- there's a dispute, but they have identified two
24 accounts that they say may be infrastructure related,
25 Infrastructure Fund related, is it burdensome to produce the

1 audit material relating to those accounts?

2 MS. MCKEEN: I think it is, because I think it would
3 still require, as a threshold matter, figuring out what it is
4 that they even really think they want. Because, of course,
5 the motion claims that they're -- they're really being very
6 specific and they only want a few things, but then of course
7 when you go and look at their proposed order, it's incredibly
8 overbroad. It's not at all targeted in the way that they
9 claim to be targeted in their motion.

10 And I think the difficulty when you start opening the
11 door to communications with auditors becomes a practical one
12 of how to keep things narrow in the way that they should be,
13 because I think we have every reason to believe here that
14 whenever there's any opening, or any chance for more discovery
15 and more documents, defendants will take it. And that's what
16 we've seen here.

17 Judge Swain's order was very clear that we should be
18 targeted; and what we've seen in response is two dozen
19 third-party subpoenas, and a proposed order here that talks
20 about all documents and communications concerning very broad
21 topics. And what Judge Swain was talking about was higher
22 level materials, like what are the documents governing
23 something, what is the process.

24 And I think that's the fundamental disconnect here
25 between -- between the sides, is that, you know, they say that

1 they're -- you know, Ms. Miller said they were being targeted,
2 because they hadn't asked for, quote, everything. That's not
3 our view of what being targeted is. And I think that's what
4 the Court has to resolve today, so that this doesn't balloon
5 out of control.

6 THE COURT: Well, I think that the fundamental that
7 I'd like you all to think about and we'll circle around to is
8 how to define and have input into the appropriate places to
9 look for these materials. I mean, if you're interviewing
10 people who have knowledge about it, it seems to me that Ambac
11 or that the defendants are going to turn around and say, well,
12 we should be able to depose these people. Somehow they need
13 to be disclosed in this, if these are the people with
14 information.

15 MS. MCKEEN: Well, I suppose -- I suppose I haven't
16 tussled with that just because the idea that the kinds of
17 folks who know where to send us to look for materials are the
18 same folks that you'd want to depose about the underlying
19 subject matter. I'm not sure again that that would be
20 efficient here. I don't think that we need to have discovery
21 about the discovery process. I think if --

22 THE COURT: I think that's part of the problem,
23 though. I'm sorry. I didn't mean to interrupt you, but that
24 is part of the problem. It has to do -- when I read these,
25 it's like ships passing in the night. It's your opening that

1 | says, but we are producing these things; and the defendant
2 | saying, they're limiting their production to some central
3 | file, which I don't know what it is, and I don't understand
4 | the investigation that goes into it.

5 | That's been a fundamental disconnect, I think, since
6 | we started discovery in this many, many years ago; and I think
7 | we need to spend a little time on how to make that a better
8 | communication, so that if the defendants are feeling that
9 | they're not getting -- they always have to bring their motion
10 | to compel before they've had a chance to review the documents,
11 | because obviously we're in a short time frame here, but the
12 | search has to be complete on the topics. And --

13 | MS. MCKEEN: I think -- I think to the extent the
14 | Court thinks it would be helpful for us to provide more
15 | detailed information about our searches, that is absolutely
16 | something that we're willing to do, because, as I said before,
17 | we think those searches have been robust, and, as I said,
18 | continue to be robust, because we're not finished yet.

19 | So that's information that we can provide. I think,
20 | you know, while we want to be transparent, you know, we still
21 | want to be efficient. And I don't think the fact that we talk
22 | to somebody about, like, hey, where might a certain document
23 | be necessarily means that person ought to be deposed, but
24 | that's of course a discussion we could have at a future date.

25 | I don't see any concern with saying that we have to

1 provide defendants with information about where we've looked
2 for things.

3 THE COURT: All right. Continue.

4 MS. MCKEEN: So with that, I would like to turn it
5 over to my colleague, Ms. Pavel, who I think can just, while
6 we're on PRIFA, just quickly go request by request and explain
7 what it is that we either have already provided or will be
8 providing that I think speaks to the topic for each of those
9 requests, because I just want us to be very clear that there
10 isn't a single topic that's at issue in the Rule 56(d) order
11 where the government parties have sort of rested on their
12 laurels and said, we're not doing any more because we already
13 did it in the lift stay. For every single topic, we are doing
14 more, trying to find more, and I just wanted that to be really
15 clear on a granular level.

16 THE COURT: Okay. Thank you.

17 MS. PAVEL: Good afternoon, Your Honor. Ashley Pavel
18 on behalf of AAFAF.

19 Ms. Miller mentioned two particular topics, the
20 nature and location of the Infrastructure Fund, and the
21 accounting treatment. I'll start with the nature and location
22 of the Infrastructure Fund.

23 As we noted in our papers, and I won't repeat it all
24 here, we have provided a lot of information already. We've
25 spoken to over a dozen people, and we've provided the output

1 of those discussions in a sworn interrogatory response. We've
2 provided cash flow discovery showing exactly where the 117
3 million that the statute required to be covered into the
4 Infrastructure Fund went.

5 And to Ms. Miller and Mr. Langley's point about the
6 accounting, we are providing an export from the PRIFAS system
7 showing exactly how that 117 million and the rest of the rum
8 tax revenues are being coded. We have also agreed to search
9 for the GASB 54 statements that they've asked for. And we are
10 also searching for any policies and procedures, instructions
11 and directives that are given to Treasury personnel as to when
12 to apply these codes or what to use them for.

13 And so I think when Ms. Miller says that we're just
14 not providing anything else, that that's just not accurate.
15 We are providing the accounting discovery that will allow them
16 to test their theory that the Infrastructure Fund is an
17 accounting designation.

18 And the rum tax accounting, I have a similar point.
19 I think it overlaps with the materials that we're providing in
20 connection with the Infrastructure Fund.

21 THE COURT: So is part of the issue here that you say
22 that you can pull reports from PRIFAS, and the defendant is
23 saying, but we don't know what other kinds of reports can be
24 pulled -- is it helpful to have that conversation?

25 MS. PAVEL: I think if -- I didn't mean to interrupt

1 you.

2 THE COURT: No. Go ahead.

3 MS. PAVEL: There's a bit of a disconnect. We're
4 doing a query of the data saying give me all the data points
5 for -- I'll use PRIFA as an example -- revenue code R4220,
6 because that's what has the rum tax revenues. And then
7 there's actually some manual work that has to be done to make
8 that accessible in an Excel format.

9 We can certainly inquire into what off-the-shelf
10 reports are available, but I don't think it would be
11 appropriate, as the proposed order seems to be asking, for the
12 government to come up with a list of every possible analysis
13 of -- a consultant could sit with PRIFAS for a few days and
14 do.

15 I mean, I think it makes sense to look at the data
16 and meet and confer from there, as opposed to coming up with
17 some comprehensive list of everything that could potentially
18 be done with the data.

19 THE COURT: Well, I guess I'll circle back to
20 Ms. Miller on this after you're done just on whether the meet
21 and confer to define the scope, or at least to identify the
22 questions that would like to be asked of the system -- I
23 recall reading somewhere that that was an area of dispute as
24 to at least the defendants were feeling that they were unable
25 to identify the reports that could be generated.

1 I have all these brilliant ideas. We'll see where
2 they go.

3 MS. PAVEL: Yes, Your Honor.

4 THE COURT: Yes. I'm going to like that transcript.
5 Brilliant ideas. Yes, Your Honor.

6 Okay. So is there anything else you want to describe
7 about the information that you're providing?

8 MS. PAVEL: No, Your Honor. Thank you.

9 THE COURT: Okay. Oversight Board, do you want to
10 weigh in on this?

11 MR. FIRESTEIN: So, Your Honor, it's Michael
12 Firestein on behalf of the Board.

13 And I may yet yield to my partner, Mr. Rappaport, who
14 is more in tune with the PRIFA issues, but I want to just make
15 an overarching statement. First of all, I agree with what
16 Ms. McKeen and Ms. Pavel have said relative to the searches
17 that have been undertaken and the additional documents that
18 are being produced. And in some respects, the Court may be
19 correct in terms of ships passing in the night, because the
20 reality is this is not simply an oral communication about what
21 is being produced. This has been reduced to writing.

22 But the overarching position that I want to just
23 touch on is the fact that the -- you know, everyone is looking
24 to the touchstone of targeted, limited, efficient and
25 proportional. And no doubt, when the 56(d) order was issued

1 and the follow up status reports were issued, this was fully
2 in the Court's collective mind, both in Your Honor's orders
3 and whatever Judge Swain may have issued, regarding what the
4 calendar is that we're dealing with here. All right.

5 And it's -- right now the government's document
6 production is to be completed by April the 14th. Much can
7 happen in a month, but you can't build Rome in a month. And
8 the discovery is to be completed by May the 7th. And these
9 were dates that were battled over by the parties with
10 knowledge of what the particularized categories were that were
11 identified by Judge Swain.

12 So there's some balance here that needs to be struck
13 between what the Court's belief was at the time when it was
14 articulating the categories and what is an ever increasing sum
15 of discovery. And I'll just give a couple of examples.

16 When we talk about providing the names of the people
17 potentially, Ms. McKeen used the term discovery, about
18 discovery, I'm concerned that we'll have 30(b)(6) depositions
19 with three dozen topics for each entity, but we're also going
20 to have 20 individuals who are going to end up being deposed.
21 And that is going to consume so much time between the
22 technology and everything else.

23 Just -- but putting all that aside, just the
24 coordination of that seems like it would have been not
25 contemplated, at least in my submission to the Court, when

1 | these categories were particularly identified. So in my mind,
2 | as we go through this, and trying to figure out how to best
3 | manage this, I don't want the Court or, frankly, the parties
4 | to lose sight of the fact that this is, you know, part of
5 | another process.

6 | I know what the retort is going to be. There's
7 | billions of dollars that are at stake. There's been billions
8 | of dollars that have been at stake. And we throw those
9 | numbers around loosely as if it's somehow pocket change, but
10 | we know it's not, that it's substantial and that the merits
11 | are important.

12 | However, that was known when we were trying to
13 | establish this calendar. That was known when the Court
14 | imposed deadlines on when the Commonwealth needed to file
15 | either a term sheet or a plan of adjustment to move these
16 | cases along. So in my mind, I just want to have a notion of
17 | perspective that gets factored into the concept of efficiency,
18 | targeted nature, and proportional.

19 | And if I could, Your Honor, I just want to make one
20 | observation about audit work papers. And I appreciate the
21 | Court's comments about, well, it might be subsumed within it.
22 | I want to focus, only because Mr. Natbony raised the same
23 | issue -- and it pertains to HTA, and if you want me to hold
24 | off, I'll hold off. But it relates to a comment that he made,
25 | and it won't take but 30 seconds. But I'll yield to the

1 Court --

2 THE COURT: You've got 30 seconds. Go ahead. But
3 I'm not listening to HTA right now.

4 MR. FIRESTEIN: I understand that. But the only
5 observation I want to make there is with respect to the
6 concept of audit work papers. In the 56(d) Declaration that
7 was submitted by Mr. Servais relating to HTA, there was a
8 specific category that said documents provided to and
9 communications with Commonwealth and HTA auditors related to
10 pledged revenues, including work papers, engagement letters,
11 tie outs, support for financials, explanations provided
12 auditors. It goes on. Nowhere in the 56(d) order is there a
13 discussion about any of that. It's about materials governing.
14 It's about policies and procedures. And that's the stuff that
15 Ms. McKeen is speaking to.

16 So I want to be careful that we don't, through
17 slippage, get into things that while there might not have been
18 a blanket prohibition in the Court's view, that nevertheless
19 are things that we have to be very careful about what was and
20 was not intended to be included.

21 And on that, Your Honor, I think I was inside 30
22 seconds. But I'll just, if I might, Your Honor, it's
23 difficult on Zoom, yield to Mr. Rappaport if he wants to make
24 any observations. I'm not saying that he should, but if he
25 has any, this would be the time, on PRIFA.

1 MR. NATBONY: Judge Dein, did you want me to respond
2 or did you want to wait for HTA?

3 THE COURT: We're going to wait until HTA.

4 MR. NATBONY: Thank you, Your Honor.

5 THE COURT: We are going to wait. I think that the
6 categories are very different for each of the three, and they
7 are very specific, so we'll deal with them --

8 MR. NATBONY: (Nodding head up and down.)

9 THE COURT: We'll deal with them in order.

10 Mr. Rappaport.

11 MR. RAPPAPORT: Lary Rappaport from Proskauer Rose on
12 behalf of the Oversight Board.

13 I think I'm really just going to echo what Your Honor
14 said and what Ms. McKeen said, which is that I think the
15 category or the topic which Judge Swain laid out with respect
16 to the Infrastructure Fund, about the nature and location of
17 the fund and then the restrictions placed on the money, yes,
18 there's a legal interpretation dispute that's been going on.
19 There's disputes as to not what the words of the statute say,
20 but how they're interpreted with respect to the obligation to
21 appropriate the money to PRIFA.

22 The Infrastructure Fund under the statute is to be
23 held by or in the name of -- or I think it's by or on behalf
24 of PRIFA, and our position has been and remains that when the
25 money was being appropriated by the Commonwealth, that first

1 117 million dollars, it went into two funds that were in the
2 name of GDB, which at the time was the fiscal agent for PRIFA.
3 And those funds have been identified.

4 And as the defendants well know, we have different
5 legal positions regarding whether there was a continuing
6 obligation or not, and what the legal effect is of such things
7 as the retention power of the Commonwealth as preemption. We
8 have a legal dispute over that. But the fact is that
9 information has been and is being provided by AAFAF, by the
10 government through AAFAF, and they know very well where that
11 money went. They know when it came from the United States
12 Treasury, where it went. They know when it left the lockbox
13 account; that it went into the TSA account with the
14 Commonwealth Treasury. And that's what happened to the 117
15 million dollars.

16 And we could argue all day over the legal
17 significance of it, but that's not the purpose of the
18 discovery. And I believe that both Ms. McKeen and Ms. Pavel
19 have already explained what is being provided to demonstrate
20 that. And from our standpoint, we think that it is limited,
21 targeted, proportional and efficient. And Your Honor will
22 decide what, if anything else, has to be done with it. But
23 that's not going to resolve the legal dispute from those
24 facts.

25 THE COURT: Thank you.

1 Ms. Miller.

2 MS. MILLER: Okay. So let me start, because I think
3 Mr. Rappaport quite confusingly referred -- totally confused
4 the idea as Mr. Langley was trying to clarify at the outset
5 between funds and accounts. Yes, we know what bank accounts
6 the rum excise taxes flowed through. We got a lot of that
7 information. And to the extent there were gaps, that is being
8 filled. We all acknowledge that.

9 What we don't know and what they are still, even
10 after Ms. Pavel's summary of everything -- their dissertation
11 of everything they're giving us, they're still not giving us
12 what anybody said contemporaneously about what the
13 Infrastructure Fund was.

14 Did it correspond to an accounting account that is
15 held, a revenue account in the PRIFAS system? Did it
16 correspond to particular bank accounts? Was it something
17 else? They're not doing any analysis.

18 And you look at their interrogatory, and it says,
19 well, the statute says there's an Infrastructure Fund that the
20 first 117 million goes into. The first 117 million flowed
21 through these two bank accounts after it hit the TSA. And
22 then it says, based on the foregoing, the Infrastructure Fund
23 was the first 117 million in rum tax remittances historically
24 allocated to PRIFA.

25 Okay. They do the same thing at CCDA with respect to

1 the transfer account. I don't know why we have to accept that
2 rather than say, do a search and see. Did anybody talk about
3 the Infrastructure Fund? When it was established, in 2006,
4 did anybody say, R4220 is the code that we're going to use for
5 the Infrastructure Fund?

6 Why are we not entitled to know whether there was any
7 internal communication about the nature and location of the
8 Infrastructure Fund and any restrictions that are on it? I
9 mean, the notion that they're trying -- that they want us to
10 adopt is there is a fund established in the statute. There is
11 a fund -- that same fund then has a central role in the bond
12 resolution, or the trust agreement in this case, but no one
13 within the Commonwealth ever said anything about it, ever tied
14 it to bank accounts, ever tied it to an accounting account.

15 We don't know. Maybe it's an accounting account.
16 Maybe it's a bank account. Maybe in CCDA, we'll just guess
17 and assume it's some combination of three of them. But I
18 just -- I don't understand how discovery related to the nature
19 and location of the Infrastructure Fund does not include going
20 and looking for what people at the time said was the
21 Infrastructure Fund. And maybe it's nothing. And maybe it's
22 a whole lot.

23 And that's where I think the audit materials, which
24 -- I'm going to let Mr. Natbony address HTA, but there's no
25 question that the accounting materials related to all of this

1 is expressly included in PRIFA. It was not only in the
2 clawback discussion. It was also in what we had, the category
3 of the nature and location of the Infrastructure Fund, and it
4 is expressly included in the 56(d) order. And that seems like
5 a targeted place to look.

6 And to Ms. McKeen's point that, well, KPMG is really
7 busy auditing the Commonwealth's current financials, we're not
8 looking to interrupt the current process. We would like that
9 audit to be completed as timely and as quickly as possible.
10 It's many years delayed already. But I don't think that
11 asking them specifically for the accounting relating to the
12 PRIFA component unit is going to be particularly burdensome.

13 And I've done a lot of discovery of auditors in my
14 years, and I am always amazed and impressed at how incredibly
15 organized they are. They have their lists. Everything is
16 categorized. It is ticked and checked, and they have the
17 supporting documentation. And it is neatly held in a very
18 finite doc -- in a file. And that's all we want.

19 I don't want, because, frankly, I don't have the time
20 or resources to go through every communication that they've
21 ever had with the Commonwealth about anything related to the
22 Commonwealth audit, because I'm confident that that's more
23 volume than I want to look at. I just want the analysis of
24 the PRIFA Special Revenue Fund. That's what I want. You
25 know -- and I'll pause. I don't know if you've --

1 THE COURT: I do want to pause. So are you talking
2 about these two funds that you've identified in the financial
3 statements?

4 MS. MILLER: Yes.

5 THE COURT: All right. Are you talking about -- what
6 are you talking about? Instructions relating to those funds?
7 If you had to ask the auditors what you needed from them, you
8 want instructions in 2006?

9 MS. MILLER: So, well, they may -- they probably
10 don't have the 2006 materials, but there's a description of
11 the Puerto Rico Infrastructure Financing Authority Special
12 Revenue Fund. So there are balance sheets, you know, account
13 balance sheets that got rolled up, because it's a component
14 unit, or becomes a component unit in more recent years. So we
15 would like documents related to the accounting.

16 So it has, for example, a line item for amounts
17 receivable from other government entities, like to know what's
18 included in that line item. And then there's a description
19 that includes a description of the nature of the first 117
20 million dollars. And that description has changed, we would
21 say quite materially, over the last number of years, and in
22 particular, in the audited financials that were released.
23 After the Commonwealth started, you know, came up with this
24 conditionally allocated theory, all of a sudden that comes
25 into the audited financials.

1 And I'd like whatever support there is for that
2 description or the change in what they had previously
3 designated as the nature of those funds, what was the basis
4 for that change. And maybe it's as simple as, you know, the
5 Title III filing. Maybe it's something else. But that seems
6 like it's directly going to the nature and location of the
7 Infrastructure Fund.

8 THE COURT: So could there be a request to KPMG
9 limited to documents explaining the basis for that
10 description?

11 MS. MILLER: Yes. I think we would want the -- the
12 basis for the line items in the balance sheets, and then also
13 for that description. So it's sort of two pieces, right?
14 There are -- there's the component unit balance sheets, the
15 Special Revenue Fund, what are called like the fund account
16 balance sheets; and then in addition to that -- and I'm
17 looking at Mr. Langley and hoping that he jumps in if I'm
18 saying this totally wrong. And then in addition to that,
19 there's a general description disclosure. And those are the
20 two pieces that we would want documents related to.

21 MR. LANGLEY: Your Honor, and I can provide a little
22 bit of context to that. At the risk of opening accounting
23 jokes, I am a CPA in addition to being a lawyer, and did
24 perform audit functions for a big four.

25 And we have submitted an expert report here from a

1 CPA that is on the Governmental Accounting Standards Board at
2 Docket No. 83 in the PRIFA adversary proceeding that lays out
3 what he would need to see to be able to make these
4 determinations that he has opined on based on a limited
5 discovery that he got from lift stay discovery.

6 So what we are looking for is like we've identified.
7 They have a debt service fund and a special revenue fund that
8 are specifically attributable to PRIFA, and those identify the
9 117 million. And to understand what we're seeking, I've
10 actually corresponded with RSM Puerto Rico, who is PRIFA's
11 auditor, and they've already provided an initial disclosure of
12 financial statements from PRIFA that we didn't have.

13 We had the 2015 and 2016, but they've given us 2013
14 and 2014 already. And there's new information that we didn't
15 have. We didn't go to auditors. And we actually see the 2013
16 financial statements showed that the Special Revenue Fund on
17 the Commonwealth's books is actually shown also on PRIFA's
18 books as a restricted asset with 117 million dollars in it.

19 So this discovery that we've already begun has
20 already turned up very probative, relevant information showing
21 this 117 million dollars that's owned by PRIFA. So that we
22 can target specific -- and we've done that. There are
23 specific notes that discuss PRIFA. There are specific notes
24 that discuss special revenue funds and how they constrain
25 resources within the Commonwealth.

1 We can identify those, and go back to the Board and
2 go back to AAFAF and make sure that we're very clear that we
3 are not trying to do a forensic audit of everything that's out
4 there. I don't want to do that. I used to do that. I don't
5 want to do that again. We can target this and make it very
6 specific to what we're trying to obtain.

7 MS. MCKEEN: Your Honor --

8 MR. FIRESTEIN: Your Honor, can I make one
9 observation? Can I make one observation? I'm sorry. I just
10 feel compelled to say this.

11 THE COURT: You need to first identify yourself and
12 then speak.

13 MR. FIRESTEIN: Michael Firestein of Proskauer for
14 the Board.

15 We have an understanding with the defendants that if
16 they receive responses or productions, that they would share
17 those productions with us. This is the first I've heard of
18 something that they have apparently received from a third
19 party, documents responsive to this discovery, and I don't
20 know what he's talking about.

21 And this is not the first instance I've actually had
22 to exchange -- so I want a commitment, if I could implore the
23 Court to have this confirmed, that when they get documents in
24 response to a subpoena, they will send them to us.

25 THE COURT: I'm assuming that that's the agreement.

1 MR. LANGLEY: Your Honor, we did provide those.
2 Those are the financial statements for PRIFA. They were sent
3 over, I believe, from Milbank.

4 So we can confirm with Mr. Firestein and make sure
5 that everything is being done above board, but those were
6 provided. I think that's a complete --

7 THE COURT: That's Mr. Langley speaking, by the
8 way.

9 MR. LANGLEY: I apologize.

10 MR. FIRESTEIN: This is Michael Firestein.

11 If they have been, that's fine. I have tried to
12 maintain attention to what we have seen under the
13 circumstances, and I don't recall that. So if that has
14 occurred, then I'll stand corrected on the point, but I don't
15 recall seeing it.

16 And if -- as long as it's the agreement that's going
17 to be provided, that's good enough for me. And I'll take
18 Mr. Langley and everybody else at their word on that point,
19 but I don't recall seeing that.

20 MS. MILLER: Ms. Miller for the record. Atara Miller
21 from Milbank.

22 I will confirm, or I have confirmed that we have
23 already produced the RSM materials. And I also -- just so
24 that there is clarity, our intention is to produce documents
25 as we get them on a periodic basis. So it's not -- you know,

1 we're not going to be uploading things every day, but we're
2 imagining to do it, you know, once a week if it's slow, twice
3 a week if things pick up.

4 So you have our representation, we've committed to it
5 already, and we will continue to produce any materials that we
6 receive.

7 THE COURT: Okay. Now, I'm trying to figure out,
8 Ms. McKeen, if there's a very targeted request of audit papers
9 relating to these two accounts, and in particular, the
10 description of these funds.

11 MS. MCKEEN: So I think what we just heard
12 illustrates the problem that the government parties have had
13 throughout this entire discovery process with what defendants
14 are doing, which is that they say that what they want is very
15 targeted, and they can be very narrow. And then when the
16 Court comes up with a good idea, which is can this be limited
17 to documents explaining the basis for this description, what
18 you hear in response is, well, it could be that, and then
19 these other things, and communications about these other
20 things, and to be fair, we've also just gotten some materials
21 that shed light on this, but we still need more.

22 I'm going to read what they asked KPMG for. They
23 asked KPMG for documents and communications concerning
24 Treasury's accounting practices, including the use of fund
25 accounting, GAAP, and GASB principles. I cannot imagine a

1 more overbroad request.

2 And so I think that what we need to grapple with here
3 is how are we actually going to limit this in a way that makes
4 sense? Because defendants have shown no ability to reign
5 themselves in. And so to the extent the Court is inclined to
6 grant some discovery on this issue, it should be exactly as
7 you say, which is it should be limited to documents sufficient
8 to show a certain thing, or a certain fact, not "all documents
9 concerning", not "communications about". And it should be
10 extremely narrow, not the way that defendants have crafted
11 it.

12 And so I think part of the issue here is that it's a
13 consistently moving and expanding target. If they had
14 submitted a proposed order with language like you just
15 articulated, we may be in a different place than we are now.

16 So, you know, we continue to think that this is not a
17 path you need to go down, because of all the other materials
18 that are being provided, but I do think if you're inclined to
19 go down this path, there has to be some sort of stringency
20 here, otherwise, to expect the defendants to reign themselves
21 in won't work.

22 THE COURT: I think there has been a difference in
23 philosophies with the defendants asking for everything, and
24 then saying that you can narrow it in a meet and confer; and
25 the government, on the other hand, saying, we'll figure out

1 | what's relevant; and the defendant saying, no, you don't get
2 | to vote on all the relevance; we get to figure out what's
3 | relevant, too.

4 | So I think, you know, you're right, there are
5 | different philosophies in this, but I think we do need to work
6 | together at this point to finalize this discovery. I think if
7 | there are -- I'm going to ask Ms. Miller to help me on the
8 | words, and Mr. Langley, but if there are two specific accounts
9 | that you are interested in that you think are relevant, and
10 | there is a description of what those accounts are -- so it's
11 | not just trace the money and then come up with an idea, but if
12 | there is a description of these accounts, and the description
13 | has changed over time, that there should be a targeted
14 | discovery explaining how these accounts are defined, what
15 | they're intended to contain -- reflect, and what is the basis
16 | for the descriptions changing over time.

17 | MS. MILLER: So I think what we need -- again, for
18 | the record, Atara Miller for Milbank.

19 | What we would need are the audit papers related to
20 | the Puerto Rico Infrastructure Financing Authority special
21 | revenue account -- or Special Revenue Fund, rather, and the
22 | Puerto Rico Infrastructure Financing Authority Debt Service
23 | Fund, and the related disclosures, or the disclosures related
24 | thereto.

25 | So the way audited financials work is you have your

1 | financials, and you have the disclosures, and this is the -- I
2 | can't remember what it's called, summary description maybe of
3 | the Commonwealth's special revenue funds, because I think the
4 | section is something like that. And it specifically is under
5 | the heading Puerto Rico Infrastructure Financing Authority
6 | Special Revenue Fund. And there is a one paragraph
7 | description. So we would like audit materials related to
8 | that, those three things.

9 | THE COURT: So, but --

10 | MS. MCKEEN: I'm sorry.

11 | THE COURT: What does audit materials mean?

12 | MS. MILLER: Well, I think the auditors will have an
13 | audit file on the PRIFA Special Revenue Fund. That's what we
14 | want. And unlike me, where if you want my really important
15 | e-mails, you have to go through all of my e-mails, auditors,
16 | if an e-mail is important and supporting of a disclosure in
17 | the financial statement, will append it to the record, whether
18 | it's an electronic record or -- an electronic file or a hard
19 | copy file.

20 | THE COURT: So I guess I want to make it clear,
21 | though. We're not talking about the accounting documents,
22 | because that's going to be what's being produced by AAFAF, or
23 | FOMB, or whatever, through the PRIFAS system. What we're
24 | talking now, and this is in lieu or this is what you're
25 | getting instead of the request for communications in general,

1 or e-mails in general, what you're getting is documents that
2 describe what these funds are and why the description has
3 changed over time.

4 MS. MILLER: So that is an important part, but there
5 is a fundamental difference between the accounting statements
6 in the audited financials and what the -- what the government
7 is proposing to give us out of the PRIFAS system. Those are
8 two very different things. One is an account balance sheet
9 for PRIFA. What are PRIFA's assets and liabilities within
10 this special revenue fund. There it includes a -- you know,
11 as an asset, a payable from -- you know, a receivable from
12 another government entity, for example.

13 THE COURT: But that's beyond what was allowed here.
14 I mean, here we're talking an instrument --

15 MS. MILLER: That's the Infrastructure Fund. Why
16 wouldn't that describe the nature of the Infrastructure Fund
17 and tell me what's included within it?

18 MR. LANGLEY: Your Honor, this is Adam Langley again.

19 I think I can find some clarity in this. So what an
20 auditor would do is they would go to the management of
21 Treasury and the Commonwealth and say, we see that you're
22 reporting this infrastructure fund. It's a special revenue
23 fund. That is showing in your financial statements as being a
24 restricted asset for a specific purpose. What do you have to
25 evidence that this is a restricted asset?

1 And they would provide the law; they would provide
2 whatever they're basing their conclusion on; and then put that
3 in their work papers specific to what they're looking at.
4 Communications, evidence of laws, evidence of whatever
5 documents they're relying on would be there. So that's a
6 pretty easy, specific, targeted ask.

7 THE COURT: I think that's --

8 MS. MCKEEN: Your Honor.

9 THE COURT: Yes. Go ahead.

10 MS. MCKEEN: My only observation would be that --

11 THE COURT: This is Ms. McKeen.

12 MS. MCKEEN: Yes. I apologize. Ms. McKeen on behalf
13 of AAFAF.

14 I just want to fix this disconnect between the
15 language you keep using, which is documents that describe, and
16 the language Ms. Miller keeps using, which is all documents
17 that relate to. I think there's a big difference between
18 those two things, and it's the "relating to," "concerning"
19 that gets us into problem territory.

20 So to the extent you're inclined to issue an order
21 around the subject matter that you were just describing, it
22 would be our request that the documents be of a nature that is
23 what I'll call like a "sufficient to show", as opposed to
24 "everything about".

25 THE COURT: I agree. I agree with Ms. McKeen, and I

1 recognize that these are not all the documents that Ms. Miller
2 wants; but I think that the discovery is limited to
3 identifying the nature and location of the funds and the
4 restrictions placed thereon. I think that to the extent there
5 have been these two -- I can't remember if you're saying two
6 or three, I think two specific funds that the defendants have
7 identified, the audit papers which describe and/or explain the
8 nature and content of these funds, and any restrictions placed
9 on the monies therein, need to be produced.

10 And while I assume it will be subsumed therein as
11 special attention to the description of those funds that are
12 included in the audited statements, and I think what's going
13 to happen when this is over is I'm going to ask everybody to
14 submit -- see if you can work out the language together, if
15 you can. If you submit separately, I'll come up with my
16 own.

17 MS. MILLER: So, Your Honor, again, Ms. Miller for
18 the record.

19 I just want to make clear that you are contemplating
20 production of materials from the auditors beyond just the
21 disclosure, because, as you described it, I could imagine the
22 government cutting and pasting the disclosure and the audited
23 financials and saying, here you go. Here is the description
24 of the nature of the restriction.

25 THE COURT: No, I do -- I am ordering the explanation

1 for the changes, so that would -- it may very well include
2 e-mails. It may very well include communications. I don't
3 know. But I think that those documents would identify the
4 nature and location of -- instead of saying the Infrastructure
5 Fund, I'm saying these two specific funds that have been
6 identified by the defendants as potentially being the
7 Infrastructure Funds.

8 So does that work?

9 MS. MILLER: I think so. The devil's in the details,
10 but I am hopeful that we'll be able to work something
11 consensual out in terms of scope.

12 THE COURT: You see, there's always that fear of
13 letting me write it, which, you know, you never know what you
14 end up with that way. I think that in addition, when
15 supplemented with the additional discovery that the government
16 has agreed to produce, I'm hearing that that's going to cover
17 the topics that were allowed for PRIFA.

18 MS. MILLER: So I just want to cover some of the
19 other -- because I don't think we covered all of the pieces.

20 THE COURT: I do want to talk about, just before we
21 go into anything else specific, and this is to you,
22 Ms. Miller, what about a description of where was searched or
23 input into where should be searched? How do we get to that
24 point?

25 MS. MILLER: So I was going to go there next, because

1 I do think that we are entitled to a list of who they're
2 talking about and whether it's names of individuals or it's
3 their position. You know, if they're just custodial, you
4 know, records people, I don't know that I need their name. We
5 can go back and ask them for their name if we decide that that
6 information is critical.

7 But, you know, when Ms. McKeen was first describing
8 the 20 people or dozen people that she had spoken to, and made
9 the point, I think quite adamantly, that if they said that it
10 was in e-mails, then they would be searching those e-mails and
11 producing them, but then I heard her say, well, those aren't
12 necessarily the people who have the substantive knowledge,
13 well, if they are not the people who have the substantive
14 knowledge, how are they going to know if someone else has
15 relevant information in their e-mails about it?

16 THE COURT: No. I'm saying this is usually covered
17 by the controller and, you know, there are files on that.

18 MS. MILLER: Of course. Absolutely. And that we
19 think that they have done already, and the problem is that
20 that hasn't turned up any information one way or another on
21 what definitive -- about what the Infrastructure Fund is. And
22 I think the -- sorry. And I think one of the key points is
23 trying -- we think we are entitled to know whether people
24 contemporaneously within the Commonwealth held certain funds,
25 certain accounts to be the Infrastructure Fund; not a post

1 facto, 20 years later in bankruptcy, when they're taking
2 certain legal positions, what they now say that the
3 Infrastructure Fund was. Because I can tell you that in 2013,
4 it probably wouldn't have been described as the first 117
5 million that was historically transferred to PRIFA.

6 And I agree that there's going to be legal fighting
7 about the significance of it, but we do need to figure out
8 what the Infrastructure Fund is. That's what we were charged
9 with. And the answer that says, well, we'll just never know
10 -- someone has to know it. I mean, maybe I'm putting too much
11 faith in the Commonwealth, but I am confident that somebody in
12 the Commonwealth knows what the Infrastructure Fund is.

13 MR. NATBONY: And, Your Honor, William Natbony.

14 MS. MCKEEN: Your Honor, may I be heard?

15 MR. NATBONY: Just on the same issue, to add, to the
16 extent that there are relevant custodians, and there are
17 e-mail files of people who are no longer there that could, in
18 fact, have contemporaneous statements or communications
19 relating to what the Infrastructure Fund is, are those going
20 to be searched? And if they are, you know, I think we should
21 know which ones are being searched, so we can have an
22 understanding as to what the scope of the work is.

23 THE COURT: Okay.

24 MS. MCKEEN: Your Honor, a couple of things. This is
25 Elizabeth McKeen for AAFAF.

1 As I mentioned, I don't have an issue with describing
2 the locations that are being searched, including, if that
3 includes an individual's files. I think asking us to identify
4 every person we've had a conversation with, that's probably
5 not fair game. That's work product. And so I think teed up
6 in that way, that doesn't make sense. But there is
7 information we can provide about where we've looked for these
8 documents.

9 I think, though, this kind of backsliding into a
10 discussion about being entitled to e-mails about who said what
11 contemporaneously is, frankly, ridiculous. I mean, that stuff
12 is not going to be probative.

13 As Your Honor observed at one of the hearings on
14 these very issues in connection with the lift stay, no one's
15 arguing ambiguity that's going to be straightened out by some
16 e-mail that somebody sent some place along the line. It does
17 not make sense. The defendants are going to have a claim
18 against the Commonwealth at the expense of other creditors
19 based on nonpublic, informal communications that were never
20 subject to the light of day.

21 It does not make sense. It is not efficient. It is
22 not targeted. And it's particularly offensive in light of the
23 fact that defendants said to the First Circuit that they
24 thought this discovery was just gravy, and they didn't need
25 it.

1 And so given what we've already talked about
2 providing in connection with, you know, other things, I think
3 this idea of going back to a conversation about what somebody
4 said in an e-mail five years ago is not targeted or efficient.

5 THE COURT: All right. I agree that the discovery --
6 that an e-mail search on the words "infrastructure fund" is
7 not appropriate. I think that -- I think it would be fine in
8 the world of unlimited discovery, where you could have all
9 your wishes come true, but I don't think that it is the most
10 efficient way; and we are going to run out of time and money,
11 believe it or not, on this discovery. But I do think what the
12 defendants will have is information as to where all this money
13 went, came in, and the flow of the funds; and to the extent
14 that there are -- I don't know if there need to be account
15 opening documents or the like that would describe these
16 accounts from when the money -- that's what I understand
17 you're producing from PRIFAS, right?

18 MS. MCKEEN: That is correct.

19 THE COURT: Like the flow of all of the money? So at
20 that point --

21 MS. MCKEEN: Two separate things, so --

22 THE COURT: Right, but where the money came in and
23 where it was put, it seems to -- is what you're disclosing, or
24 no?

25 MS. MCKEEN: That information is being provided, yes.

1 THE COURT: Okay. So presumably, if it's put into a
2 fund, into an account, assume it's not put into someone's
3 pocket.

4 MS. MCKEEN: Well, I don't want to conflate the two
5 issues because I think, as defendants have mentioned, there
6 are differences between accounts.

7 THE COURT: Correct.

8 MS. MCKEEN: Like bank accounts versus whether funds
9 were designated in some way in a system. They are going to be
10 getting information about both those things. They are going
11 to be getting bank account statements. They are also going to
12 be getting the PRIFAS export that we've described that will
13 reflect how the funds were tagged.

14 THE COURT: Thank you. I do understand that, and
15 that was a distinction I was trying to make, that the bank
16 account information has been produced, as I understand it,
17 and/or is still being produced. The PRIFAS will be the
18 accounting information of how these funds have been accounted
19 for, correct?

20 MS. MCKEEN: Correct.

21 THE COURT: All right. I don't know if those are
22 titled in any way.

23 MR. LANGLEY: Your Honor, Adam Langley. If I may
24 speak?

25 Just to clarify just slightly, because I think we're

1 on track, but just need a brief adjustment. So when we say
2 fund designations, it doesn't do us a lot of good just to see
3 that this was labeled, you know, Fund 111 or Fund 278. We
4 actually need to know who the custodians would be of that, and
5 who are the persons that are actually authorized to make that
6 entry and make that designation.

7 So there needs to be some understanding as to the
8 control that the Commonwealth and its Treasury have put in
9 place so that we can understand the data that we're going to
10 be given from PRIFAS. If we don't have that control and
11 custodian level of what is being done, who is authorized to
12 act and what their authority is, we can't understand it.

13 So that would be the only clarification on that
14 discussion that I would add.

15 MR. NATBONY: Your Honor, William Natbony.

16 Also, there's the question of why. Why --

17 THE COURT: I think you should wait until we get to
18 HTA.

19 MR. NATBONY: But I am on PRIFA as well, Your Honor,
20 so I'm talking about PRIFA, and why the designations were
21 made.

22 THE COURT: We're not going to go -- all right.

23 MR. NATBONY: It's not a blank document that says
24 this is designation 42, whatever, for this fund, doesn't tell
25 you why the funds are flowing that way.

1 THE COURT: Correct.

2 MS. MILLER: Your Honor --

3 THE COURT: No. No. Wait. Wait. Wait. The second
4 category of documents are discovery relating to the accounting
5 treatment, including the use and purpose of account
6 designations, fund codes and department IDs. I am assuming,
7 and I believe I read somewhere, that some documents along
8 those lines have been produced already. That is appropriate.
9 It shouldn't just be a number if there is something that
10 describes it. And if not, then you'll have to go to the
11 deposition stage for a further description.

12 MS. MCKEEN: Yes, Your Honor.

13 MS. MILLER: Your Honor, can I -- Atara Miller from
14 Milbank.

15 Can I just make one point? Because I think we now
16 quite clearly all have the distinction between bank accounts
17 and funds clearly in mind. And so I'd like to just take that
18 analogy to sort of make clear where I think the gap remains.

19 What they're giving us are all the monthly
20 statements. Right. So not really, but like the aggregation
21 of all of the monthly statement information. But what they
22 are not giving us is the account opening documents. They're
23 not telling us what fund is the Infrastructure Fund.

24 When they have a particular fund and account number
25 and money's allocated -- the first 117 million get recorded in

1 that, was that established by saying L.P.R.A. whatever
2 established the Infrastructure Fund, here's how we're going to
3 account for it internally?

4 And so all they're giving us are these monthly
5 statements and saying, well, that should resolve your fight --
6 we'll get to CCDA, but that should resolve your fight about
7 what the transfer account is. But it doesn't answer the
8 question. That happens to be a bank account. This is a fund.
9 We need the account -- the fund establishing documents. We
10 need whatever materials there are, whether it's an e-mail,
11 whether it's a formal memo, whether it's something else. But
12 we need that establishing of the Infrastructure Fund within
13 the Commonwealth system.

14 THE COURT: Ms. McKeen.

15 MS. MCKEEN: Your Honor, we have told them that we
16 will provide them with the policies, procedures, manuals or
17 instructions that we locate along those lines. We have also
18 told them that we would provide them with GASB 54 fund
19 accounting statements. And so to the extent the documents
20 Ms. Miller describes are out there, we have said we will give
21 them to them.

22 So again, here the only dispute goes back to whether
23 we ought to be pulling people's PST's and running search
24 terms. And I think, for the reasons you've said, that is not
25 targeted or efficient. We are looking for the kinds of

1 documents Ms. Miller has described, and if we find them, they
2 will be produced.

3 And to the Court's earlier comments, we will provide
4 information about where we have gone to look for those things,
5 so that folks can be satisfied that we're not just, you know,
6 looking in one guy's desk drawer, because that's not what's
7 going on.

8 THE COURT: I do think that the audit papers, to the
9 extent that there were communications that explain why
10 accounts were set up, they would be included in those. I
11 think that's a more targeting search than a general e-mail
12 search. Okay.

13 MS. MCKEEN: (Nodding head up and down).

14 THE COURT: All right. So I'm going to ask you both
15 to work together on that; but if not, just submit something
16 separate, and I will wordsmith it.

17 MS. MCKEEN: Your Honor, when would you like the
18 parties to submit that?

19 THE COURT: I guess you better to do it sooner rather
20 than later, right?

21 MS. MCKEEN: It makes sense.

22 THE COURT: Okay.

23 MS. MCKEEN: I don't see any reason we couldn't get
24 it done by the end of the week. Obviously we want clarity.

25 THE COURT: I mean, and I am -- I should move on, but

1 I am assuming that the audit materials will come from KPMG as
2 opposed to -- unless PRIFA has audit files of communications
3 with KPMG?

4 MS. MCKEEN: That's a good question, Your Honor. I
5 think I'm going to have to look into that.

6 THE COURT: All right. I want you to look into
7 that.

8 MS. MCKEEN: I will.

9 THE COURT: All right.

10 MR. FIRESTEIN: Your Honor --

11 THE COURT: And request that information from KPMG.

12 MR. FIRESTEIN: I have a -- it's Michael Firestein,
13 Your Honor.

14 I have a question on that. I gather, so that we can
15 avoid going through the exercise of dealing further on the
16 KPMG subpoena, that that is the limit of the materials, or
17 something -- or something different?

18 THE COURT: That issue really isn't in front of me,
19 and I don't begin to know what it looks like.

20 MR. FIRESTEIN: At least as it relates to this issue,
21 though, that --

22 THE COURT: I don't know what to tell you on that --

23 MR. FIRESTEIN: All right.

24 THE COURT: -- so I don't want to go down that rabbit
25 hole.

1 MR. FIRESTEIN: All right.

2 THE COURT: Okay.

3 MS. MILLER: Dare we turn to CCDA?

4 THE COURT: I don't know. Is everybody ready or do
5 you need a break? You're okay? All right.

6 MS. MILLER: Hopefully it will be short.

7 THE COURT: Okay.

8 MS. MILLER: I do think that CCDA is quite narrow in
9 terms of the area in dispute.

10 THE COURT: Can I ask a question on CCDA? Maybe I
11 shouldn't ask this first, but the transfer account and the
12 identity of the transfer account, is that still an issue in
13 the summary judgment pleadings or --

14 MS. MILLER: (Nodding head up and down.)

15 THE COURT: -- did the government limit the scope of
16 its request for summary judgment to funds outside of the
17 transfer account?

18 MS. MILLER: No.

19 MR. KASS: Your Honor, this is Colin Kass for the
20 Oversight Board. In our Reply Summary Judgment Brief, we did
21 limit the request for summary judgment to partial summary
22 judgment, recognizing that the transfer account was an issue
23 that the Court had said was a disputed issue of fact.

24 So in our Reply Summary Judgment Brief, we did not
25 seek summary judgment on the identity of the transfer account.

1 THE COURT: So does that affect the scope of relevant
2 discovery?

3 MR. KASS: In our view, that should mean that that
4 issue is not on the table, and there should be no discovery.

5 MS. MILLER: It's Ms. Miller for Milbank.

6 I don't think that the Court saw it that way. I
7 mean, Judge Swain clearly included it within her 56(d) order.

8 THE COURT: Well --

9 MS. MILLER: And it was part of the initial partial
10 motion for summary judgment, and they didn't formally withdraw
11 that. And it was certainly argued. So I'm not sure what that
12 means actually.

13 MR. KASS: Your Honor --

14 THE COURT: Well, I do think -- the reason I bring it
15 up is I do think that it does take -- there is no topic of
16 identifying the nature and location of the transfer fund.
17 That is not a topic, unlike PRIFA, for the Infrastructure
18 Fund. There's not a parallel topic in the CCDA, so --

19 MS. MILLER: Because it's a bank account. I think
20 because everyone acknowledges that the transfer account is a
21 bank account, and so there are more targeted requests.

22 And so if you look, for example, at topic two, all
23 documents governing the flow of hotel occupancy taxes,
24 including all versions of documents governing the transfer
25 account, well, you have to know what the transfer account is,

1 right? So I think Judge Swain is saying we want all the
2 account documents for all of the accounts that are implicated
3 here, the transfer account, the surplus account, and any other
4 accounts through which the monies flow through.

5 And then again, if you look at romanette iv, the
6 account opening documents, and in particular, for the GDB 9758
7 account, which is the account that the Oversight Board
8 contends is the transfer account, and the reason why you want
9 those opening -- account opening documents, which they have
10 not found yet, is to determine or to help determine what
11 account is the transfer account or, you know, to the --
12 alternatively, what is the GDB 9758 account, and who owns it.

13 So I think that these requests are clearly going to
14 the question of what is the transfer account.

15 THE COURT: I'll just point out that it looked to me
16 like the issue had been limited in the reply, and that maybe
17 everybody should focus on that a little in the request.

18 MR. KASS: Your Honor, this is Colin Kass again for
19 the Oversight Board.

20 We did limit it in that way, and we do think that
21 that should govern the scope of discovery for these
22 proceedings.

23 MS. MCKEEN: Elizabeth McKeen, Your Honor.

24 I think at a minimum it informs how you ought to
25 think about what is targeted and efficient on these topics in

1 light of what's been said in the papers. So --

2 MS. MILLER: Well, I --

3 MS. MCKEEN: -- for this subject matter, I think
4 we're kind of in the same space as we were with PRIFA, which
5 is that we are providing an awful lot of information that is
6 responsive to all of these topics. We just don't think, in
7 light of the posture, that searching through e-mails makes
8 sense.

9 And I'm happy to go through each request and explain
10 what we are providing, but again, here the government's
11 position is that in light of where we are, and what we have
12 provided, and what we've agreed to look for and provide, it is
13 not targeted or efficient to search for e-mails about what the
14 transfer account might or might not be.

15 THE COURT: Ms. Miller.

16 MS. MILLER: So, Ms. Miller, for the record, from
17 Milbank.

18 But just to be clear, I mean, I hear your point and,
19 frankly, I was surprised when I read the partial summary
20 judgment motion after the lift stay decisions came out,
21 because I would have thought that that would just have been
22 off the table. But even in the motion to compel brief, they
23 go at whether the discovery is sufficient to demonstrate what
24 the transfer account is.

25 And so they make the point on page 22 that, you know,

1 essentially they are agreeing to produce documents. They are
2 going to work with the banks and get the additional bank
3 account statements that show the flow of the monies. And
4 they're going to let us trace the hotel tax revenues from 2006
5 through some pseudo recent date. And then they say, this
6 discovery will demonstrate which account is the transfer
7 account by showing how the flow of funds changed between the
8 bond issuance and the 2015 start of the lift stay discovery.

9 It's possible. Maybe it will. Maybe it won't.
10 Clearly, I think you are aware that the dispute was -- you
11 know, do you look at whether it's coming in in the first
12 account or whether it's going out. There seems to be an extra
13 account in the flow, and so what do you do with it. And which
14 one is the transfer account.

15 So I don't know that that's going to resolve the
16 dispute. I think it's going to cement the dispute that we
17 have, because I think we all acknowledge the flow, and even
18 with the missing information, other than the particularized,
19 you know, transactions which they are giving us. But at the
20 very minimum, that's like the least efficient way of getting
21 at this issue.

22 Literally piecing together and -- you know, we spent
23 many, many, many -- I was going to say hours, but days trying
24 to piece together the flow of funds to various accounts based
25 on the account -- bank account statements that we got. It is

1 an arduous effort. And the idea of going all the way back to
2 2006, and all of a sudden we're going to have this aha moment,
3 and that's more efficient than running a search in e-mails for
4 a transfer account to see if there were any accounts in
5 electronic documents or in e-mails -- I mean, frankly, I'd
6 take the electronic documents, also, that specifically
7 identify or discuss an account called the transfer account and
8 identify the bank account, it just seems totally backwards to
9 me.

10 I mean, we're doing this whole forensic analysis, and
11 then we're going to come to a conclusion based on that simply
12 to avoid doing any search other than account statements. And
13 I understand, and I really don't want to have to sit through
14 the listing of all the information they're giving us, I
15 acknowledge our dispute is narrow on CCDA. This is the nature
16 of the dispute. And with respect to this issue, they won't
17 look for what anyone said, or identified, or maybe even in
18 monthly e-mails identified as a transfer account.

19 We are not looking -- we're -- clearly we're not
20 going to prevail on an argument based on a one-off, you know,
21 e-mail by some clerk. That's not what we're looking for.
22 We're looking for whether there are core documents that, when
23 the accounts were established, discussed it, spoke about when
24 the documents -- you know, this is a suite of three documents
25 that come together. Was there a discussion of the accounts,

1 and how they worked together, and which bank account related
2 to which account designation in the documents? Was there, you
3 know, a monthly e-mail that went out that said the money is
4 moving from the transfer account to the surplus account?

5 That's the kind of thing that we're looking for, and
6 they're just blanket refusing to give it to us. And I'm not
7 looking for, you know, a search term that we're going to have
8 to negotiate a long list and parameters. I just want to
9 search for "transfer account."

10 THE COURT: Tell me why that's still relevant.

11 MS. MILLER: Well, because I think -- I think that it
12 is relevant because, first of all, I don't think that the
13 Court views the Oversight Board as having withdrawn their
14 summary judgment motion. But I also think that it's relevant
15 to the extent that they're moving as to all monies that aren't
16 in the transfer account. They certainly didn't drop it with
17 respect to all monies in the Scotia Bank account.

18 So it's like a little game of, oh, well, we're not
19 moving with respect to monies in the transfer account, but
20 you're also wrong about which account is the transfer account.
21 So you don't really have a lien on this -- on this bank
22 account. And I just -- you know, we shouldn't -- it was their
23 motion. They defined it. They should be held to it. And we
24 shouldn't be put in a position where we're subject to games
25 like that. And the consequences are material.

1 THE COURT: So did you get the account opening
2 statements or you didn't get those yet?

3 MS. MILLER: I'm not sure. I think efforts were made
4 to get them. I don't fault the Oversight Board or AAFAF for
5 this. I think efforts were made to get them. We don't -- we
6 didn't get them in the lift stay. They tried to get them. We
7 still don't have them. I'm hoping that they will get them,
8 but it may be that they just don't exist.

9 MS. MCKEEN: Your Honor, may I be heard on this?

10 THE COURT: Yes. Yes.

11 MS. MCKEEN: So from our perspective, I think
12 everything Ms. Miller just said kind of illustrates our point,
13 which is that as she acknowledges, it's not the one-off
14 e-mails that are going to be important here. Your Honor
15 acknowledged that the last time we sort of went through this
16 at the last hearing.

17 I will say it's distressing to hear that it's such a
18 pain to go through all these old bank account statements that
19 they specifically demanded that we provide it to them, and
20 they have subpoenaed many third-party banks for it. If they
21 don't want to go through the trouble, then I wish they
22 wouldn't ask us for all the things, because it's awfully
23 burdensome.

24 But I think the point is the reason we provided them
25 wasn't to avoid doing an e-mail search. The reason we

1 provided them is because that's what matters. What matters is
2 how the money flowed, because that's going to allow someone to
3 figure out who's right about what the transfer account is.

4 And I'll give you a good of example of that. Just in
5 connection with complying with the Rule 56(d) order, we
6 located a former tourism account that we hadn't found in
7 connection with the lift stay proceedings that's called the
8 room tax transfer account. And it turns out that it's never
9 had a single dollar in it. And we've now provided them with
10 the statements that relate to that account.

11 But the thesis that what an account is named or what
12 somebody says in an e-mail about it is going to be what
13 matters here is wrong. What matters is where the funds went
14 when. And they're going to have, as Ms. Miller pointed out,
15 oodles of documents to go over on that issue.

16 So the suggestion why can't we just go through more
17 e-mails I think is particularly badly taken here in light of
18 the proportionality concerns and the posture of the same.

19 THE COURT: I think that what -- the thought was that
20 the opening account statements would be a good source of
21 information as to the identity or importance of the account,
22 but you're now saying you can't locate those, so --

23 MS. MCKEEN: Well, we're still looking, Your Honor.
24 Those aren't efforts we've given up on. And certainly
25 anything additional we find, we will provide. We are working

1 with the banks. We are doing our level best on that front.

2 THE COURT: Is your investigation with the bank
3 including communications with the bank, banks, relating to the
4 opening of the accounts?

5 MS. MCKEEN: I believe so, but I'd like Ms. Pavel to
6 make sure I'm not talking out of school here. I believe we've
7 tried to be as comprehensive as possible in our requests for
8 anything we have that bears on this issue.

9 THE COURT: Ms. Pavel.

10 MS. PAVEL: Ashley Pavel on behalf of AAFAF.

11 So when we went to third-party banks, we did ask for
12 any opening materials of any kind, and provided what we
13 received.

14 In connection with the GDB 9758 account, where we
15 were not able to find an account opening statement in GDB or
16 Tourism's records, we had actually taken a screenshot of the
17 account opening information that's in GDB's banking system and
18 provided that. We are still continuing to look for whatever
19 else there may be.

20 THE COURT: In your search, do you know who was
21 responsible for opening these accounts?

22 MS. PAVEL: I do not believe so. I have to look back
23 over the documents, but I don't think so.

24 THE COURT: I'm wondering if there is a hard copy,
25 custodian of records, that you can look for. I mean, I think

1 | that the -- unless you can all agree that this issue is not a
2 | live issue at all, it seems that the opening documents, the
3 | opening statements were important. And they were important to
4 | see how the accounts were organized -- were identified.

5 | So I need something to substitute for that, if you
6 | can't find it.

7 | MS. PAVEL: We are also working with the Tourism
8 | Company, and we are looking through -- GDB is not operational
9 | anymore, but we are looking through their issuer archives on
10 | the CCDA bond issuances to look for any resolutions,
11 | instructions, similar materials like that that would disclose
12 | which account was intended to serve which purpose as the bond
13 | documents were being implemented. If we find it, we will
14 | produce it.

15 | THE COURT: When you say you're looking through their
16 | documents, are you looking through them electronically? How
17 | are you looking through them?

18 | MS. PAVEL: So it's a combination, and it varies
19 | depending on entity. For GDB in particular, they had boxes
20 | for each issuer that were digitized and in the possession now
21 | of AAFAF. And so we are looking document by document through
22 | that archived box at GDB.

23 | At Tourism, we're working with the chief financial
24 | officer and in-house counsel to determine where their
25 | documents may be and search the relevant files on that point.

1 THE COURT: So what's the objection -- it sounds like
2 you are doing the search that's needed to show how these --
3 which document -- I'm sorry. You are doing the search to
4 identify which account was identified as the transfer
5 account?

6 MS. PAVEL: Yes, Your Honor.

7 THE COURT: So why are we fighting with each other on
8 this one? Is this another one where it's a disclosure of the
9 scope of the investigation that's more important?

10 MS. MILLER: This is Atara Miller from Milbank.

11 This is certainly the first that I've heard sort of a
12 detailed description of what they're doing to try to locate
13 these materials. You know, I just -- that is more comforting
14 to me. And, you know, we can reserve on that and come back if
15 those efforts are not fruitful and don't get relevant
16 information to try to figure out a second avenue. But that's
17 much more comforting to me than just saying, well, we'll give
18 you more of the account flow funds documents that we all -- we
19 both put before Judge Swain, and she said it's not enough.

20 Doing more of that for more years isn't going to
21 elucidate the issue any more. So I agree with you that we
22 need to come up with another strategy, and account opening
23 documents are helpful.

24 So, you know, on this, I'm happy to reserve. I'm a
25 little concerned, because of the time constraints, but I am

1 happy to reserve, and see what they come up with, and raise
2 with the Court in a subsequent status report or motion if we
3 can't -- if they are not successful in their search in
4 locating relevant information.

5 I do think we need to get more information, and so
6 just saying we did the search and didn't find anything, we're
7 going to have to come up with another search to do.

8 THE COURT: Well, Ms. McKeen and Ms. Pavel, is this
9 appropriate for you to confirm, we can do it in writing, a
10 letter to each other, that you're searching for the documents
11 which would describe which account was considered the transfer
12 account, and you can then explain generally where you're
13 searching for it?

14 MS. MCKEEN: Yes, Your Honor.

15 THE COURT: Okay. So let's leave it at that for now.

16 MS. MCKEEN: (Nodding head up and down.)

17 THE COURT: Okay. Oh, no. I have to go to HTA.
18 Where are you? I've run out of bonds.

19 MR. NATBONY: Thank you, Your Honor.

20 MR. FIRESTEIN: I'm disappointed, Your Honor, that
21 you said that it was an "oh, no" factor relative to moving on
22 to HTA.

23 THE COURT: There are many of you that want to speak
24 about it.

25 MR. NATBONY: We do have a little bit to say, Your

1 Honor, so I'm sorry that I do, but it's necessary.

2 MS. MCKEEN: This is your last chance to give us a
3 break, Your Honor.

4 THE COURT: Does anybody need a break?

5 MS. MCKEEN: No. I'm teasing.

6 MR. NATBONY: Your Honor, I'm fine if you want to
7 proceed.

8 THE COURT: We can proceed, but Zoom breaks are
9 allowed.

10 MR. NATBONY: Thank you. And, Your Honor, I just
11 want to say to counsel and Your Honor, I hope everyone's doing
12 well and being safe.

13 So I think the discussion of PRIFA kind of raises
14 some similar issues with respect to HTA. So I think that the
15 questions of what is being searched, the question of, you
16 know, are they looking at individual custodians that are
17 relevant as opposed to some central file, and those are
18 relevant issues, I think, that -- I have a couple of kind of
19 general comments, and then I'll go through the specific three
20 issues, I think, that remain here that I think we need to
21 discuss.

22 But first, before HTA, as with the other credits, I
23 think it's important to emphasize that we are dealing now with
24 a merits decision. I mean, this is not a lift stay situation.
25 And Judge Swain has basically ruled that there are topics that

1 she needs a more complete record to have in order for her to
2 make a decision.

3 And when I hear Ms. McKeen say, oh, there's no
4 ambiguity here, the fact is there is. I mean, the bottom line
5 is Judge Swain has ruled that she can't deal with these
6 credits solely on the basis of the statutes, you know, and
7 the -- you know, and the evidence that she has before us, and
8 does need extrinsic evidence.

9 So to the extent that there is some implication that
10 an institutional view of what a statute or what a fund means,
11 or what the flow of funds means, or why certain funds are
12 restricted, for instance, why Fund 278 was created, why those
13 funds are segregated, these are all factual issues that need
14 to be resolved. And there needs to be extrinsic evidence
15 about it.

16 Now, nobody is saying we should have e-mails from
17 everybody on the lower level, but to the extent that there is
18 an institutional recognition somewhere about the
19 interpretation of what Fund 278 means and why it was created,
20 that's important. And I also hear, you know, the government
21 saying things like, you know, of course it has to be a
22 targeted search. And we agree there has to be targeted
23 searches and targeted discovery. But given the fact that this
24 is a merits decision, targeted doesn't mean preclusive in the
25 sense of preventing us from getting the discovery that we need

1 to challenge the summary judgment motion.

2 And I know there's a deadline, and I know we have to
3 work within that deadline, but the fact of the matter is that
4 the government started off with a position of, look, we're not
5 searching any e-mails. All we're searching are custodian
6 files. We're not identifying any custodians.

7 So, you know, in terms of delay and timing, the
8 government has been successful in putting this off for a
9 little while, and I don't think the deadline, you know, should
10 stand in the way of us getting the relevant discovery. That
11 said, let me move on to I think what the three main issues in
12 my view are that I think Your Honor has to address.

13 So Judge Swain, in her decision, clearly recognized
14 that Fund 278 is extremely relevant to her determination, and
15 it's important. Now, why? This is not just about bank
16 accounts, as the government would have you believe at some
17 point. Every penny of the HTA excise taxes were recorded in
18 this Fund 278 by the Treasury. And interestingly enough,
19 when HTA wanted to transfer those excise taxes from that fund,
20 from the Commonwealth TSA, they signed a voucher, sent it to
21 the Commonwealth, and bingo, HTA got the money.

22 When HTA prepared their financial statements, the
23 excise taxes that were in Fund 278 were reflected as HTA's own
24 income. And when the Commonwealth put out financial
25 statements, they excluded the excise taxes from their own

1 statement of revenues. So the important issue of who owns the
2 excise taxes, are the excise taxes being held in trust or for
3 the benefit of HTA is an issue that is in dispute, is an issue
4 where there's ambiguity.

5 So when you have issues like the accounting
6 documents, conversations with the auditors, why do the
7 financial statements for both HTA and the Commonwealth say
8 what they say? Why was Fund 278 created? Why is it, if the
9 Commonwealth believes that the excise taxes are its money and
10 not held in trust for HTA, why does it have to be segregated?
11 What was the purpose of forming Fund 278 and those subaccounts
12 if not for the purpose of holding, for the benefit of HTA, or
13 with the recognition that it was HTA's funds? And it's on
14 that issue that we basically have nothing.

15 I mean, we have where did the money go? That's
16 great. There's a Fund 278. But even in the flow of funds
17 charts they prepared, all they gave us was a flow of charts to
18 bank accounts. They don't even mention Fund 278. So we don't
19 know how Fund 278 works.

20 And what they want to do is they want to go into
21 their PRIFAS system, pull out some numbers and say, okay, here
22 we have these codes and these codes. That's great. But it
23 doesn't tell us why was it created, what was the purpose of
24 it.

25 So what don't we have? We don't have all that stuff

1 related to Fund 278. And, in fact, we don't have anything
2 from the Commonwealth on Fund 278. They did give us in the
3 lift stay discovery one Excel spreadsheet that showed from the
4 HTA's perspective what was in Fund 278 and requests for
5 transfers. But from the Commonwealth, nothing. And they said
6 they're not going to give us anything more from HTA.

7 We haven't received records of balances and transfers
8 from the Commonwealth, only, about HTA, one Excel spreadsheet.
9 We haven't received any information about why Fund 278 was set
10 up; what do the codes mean; are they restricted. And that's
11 part of the relevant information.

12 We haven't received the Treasury regulations that
13 govern special funds like Fund 278. They gave us regulation
14 49, but that doesn't apply, because it applies only to General
15 Fund appropriations. These funds were never put in the
16 General Fund. They are in this special Fund 278 designation.

17 Now, the government says that it will give us
18 Commonwealth, not HTA, but Commonwealth regulations, policies,
19 procedures, but the question is where are they going to look
20 for it. All right. I mean, if they're going to look on -- in
21 some central file, but not on the desks and in the files of
22 those people who are responsible for dealing with Fund 278, or
23 the top officials that are charged with overseeing Fund 278,
24 what good is it? It's flat out refused to provide that
25 information from HTA. Why are the funds being segregated that

1 way? That's what we need to know.

2 And another example is Fund 278, just like on the
3 PRIFA argument, it's an accounting fund set up under
4 government accounting standards, but again, what standards
5 existed? What instructions were given to HTA and Treasury
6 officials about why those excise taxes should be recorded in
7 Fund 278; how they should be recorded?

8 Look, the issue here is who the funds belong to.
9 This is all relevant information. And clearly, all the stuff
10 related to the specific auditor work papers relating to Fund
11 278, in answering questions of why things are said in the
12 Commonwealth and HTA financial statements, why they were set
13 up, they're all relevant to the -- Judge Swain's direction
14 that policies and procedures related to the flow of excise
15 taxes be produced. That's the topic: What are the policies
16 and procedures.

17 Now, so in that sense, the purported documents that
18 we're talking about, as I think we've said earlier, is not
19 really that burdensome. I mean, to the extent that there are
20 discussions amongst the internal and external auditors, they
21 should be in one place.

22 The auditors are the ones responsible, Your Honor,
23 for understanding what the government standards and policies
24 and procedures are. And those are the words that Judge Swain
25 used, what's governing, and what are the policies and

1 | procedures, and whether they're being followed by the
2 | Commonwealth and HTA.

3 | They rely on conversations, representations in
4 | connection with the preparation of the financial statements.
5 | What were those communications? What were those statements?
6 | What were the audit documents pertaining to the policies and
7 | procedures specifically relating to the flow of funds into
8 | Fund 278? Were they put there because they're restrictive
9 | funds? Were they put there because they're in trust for HTA?
10 | Documents like that should be produced.

11 | So that, I think, is the first issue that I wanted to
12 | say. And the other thing I just want to point out to Your
13 | Honor is we talked about flow of funds. Just so everyone
14 | recognizes, flow of funds is static, right? I mean, we have a
15 | flow of funds chart just on bank accounts, not on Fund 278,
16 | and that flow of funds changed four or five times over the
17 | course of the HTA history.

18 | And we -- when we asked during the lift stay, why did
19 | the flow of funds change, why did you first send money to the
20 | fiscal agent, you know, so they could get into the Sinking
21 | Fund. And why did you change it, why did you change the flow
22 | of funds and take money away from the fiscal agent?
23 | Objections were made, and we're told that "why" was not going
24 | to be responded to. Well, now it's time. It's time to get
25 | those answers, and it's time to see if there are documents as

1 to why the flow of funds changed if they are available.

2 The second issue, and just before I move on, to the
3 extent --

4 THE COURT: It's a lot of subparts on that first
5 issue --

6 MR. NATBONY: I'm sorry, Your Honor.

7 THE COURT: -- I have to say.

8 MR. NATBONY: I understand. But look, where are they
9 going to search? Are they going to go to the relevant
10 Treasury management personnel, for example, the finance,
11 and/or accounting, and the controller? Are they going to look
12 at those files? Are they going to see -- because they are
13 going to likely have documents relating to the institutional
14 viewpoints relating to Fund 278.

15 And I get it, Your Honor. It's like Ms. Miller said,
16 we're not looking for e-mails or things like that from
17 countless low level government employees, but there must be
18 somebody that says something about why are we forming this
19 Fund 278; why is it even necessary. They never even answered
20 that question.

21 Why are all these funds that come in that they claim
22 are the Commonwealth's funds and that HTA has no interest in,
23 why are they not just being put in their general fund? And
24 they're not.

25 So all this information about why the flow is flowing

1 the way it is, is precisely what Judge Swain needs to look at.
2 And Judge Swain needs to understand, why is it being done that
3 way, and how does it show what the institutional viewpoints
4 were, both in financial statements and otherwise, as to who
5 owns or has an interest in the funds.

6 Second issue: Judge Swain ordered the production of
7 specific documents relating to the transfer of funds from Fund
8 278 to HTA. So the question is, we argued that the excise
9 taxes recorded in Fund 278 were received by HTA and did not
10 belong to the Commonwealth, in part because HTA could
11 unilaterally transfer the money out of the Commonwealth's TSA.
12 And they did that through vouchers and transfers. And we've
13 seen some of those transfers and vouchers. Not all of them,
14 but we've received most of them.

15 Excuse me, Your Honor. That's better.

16 So we've received some of them, but not all of them.
17 Our position has been that Judge Swain has ordered the
18 production of documents on a topic concerning the Treasury's
19 role in the approval of transfers to HTA, and, two, the extent
20 to which the excise taxes were or have been made available to
21 HTA.

22 Why do we need that discovery? We need it to permit
23 us to test whether the Commonwealth implemented transfer
24 vouchers, you know, and the Commonwealth's signatures on them
25 were, as a matter of course, ministerial and not substantive.

1 That's the position we've taken.

2 We're not aware that there's ever been a voucher
3 that's been rejected. So the question is, we need all the
4 vouchers. We need to see if anyone has ever been denied, you
5 know, or rejected by the Commonwealth for one of these
6 transfers. When we asked Mr. Ahlberg, their 30(b)(6) witness,
7 that question, he wasn't aware of any, but he wasn't sure. So
8 we need to see those transfers, all of them.

9 Now, again, Judge Swain specifically recognized that
10 she could not determine what Treasury's role was in the
11 approval process based on the record that she had before her.
12 You know, and interestingly enough, the prior production that
13 the government provided was clearly insufficient. And I don't
14 know if they're looking at any other places now other than
15 they did before, but for instance, they did provide one
16 Treasury circular in the lift stay motion, which was not
17 relevant.

18 We, on your own, went on the internet and found
19 another Treasury circular that actually said that the approval
20 authority for transfers out of that account had been given to
21 HTA. They never produced that. So where were they looking?
22 If they're going to look where they looked before, then that
23 is an insufficient look.

24 What other policies, instructions, and procedures
25 exist with respect to Fund 278, you know, and the transfers,

1 the specific issue -- what role did Treasury have? Could
2 Treasury say no? Could Treasury not say no? And who's going
3 to know that? Who's going to know that? Where are they going
4 to look?

5 I would suggest that they need to look, you know, at
6 the people who were dealing with the vouchers. All right. And
7 we've tried. I mean, look, interrogatories or depositions are
8 no replacements for the documents themselves. You know,
9 self-serving testimony is not a substitute for contemporaneous
10 documentation.

11 We know the transfers existed. We know who made the
12 transfers. In our reply, we identified likely custodians, you
13 know. There are two or three or four people that actually
14 requested the transfers from HTA. There are one or two people
15 on the Commonwealth side that actually signed off on the
16 vouchers, to the extent that it was required to do so. Maybe
17 there are vouchers that were never signed that got paid. All
18 of that is relevant.

19 So we think that at minimum, at minimum, Your Honor,
20 the Commonwealth should be ordered to meet and confer with us
21 about specific custodians, the need to be -- search with
22 respect to this very particularized, very specific issue.
23 What was the role of the Treasury in approval of these
24 transfers? It's not a broad subject. And it can't be that
25 difficult. We know who was involved in them. We know who the

1 relevant custodians are.

2 THE COURT: Okay. I'm going to ask you to breathe
3 for a minute.

4 MR. NATBONY: Yes.

5 THE COURT: And I'm going to take a two-minute break,
6 and I'm going to ask the court reporter to send a text or
7 however you are communicating to let us know whether you need
8 a longer break. But let everybody take two minutes of just
9 breathing here.

10 MR. NATBONY: I only have one more short issue, so --

11 THE COURT: You have a lot of subparts on your
12 issues. So I just want to make sure that the court reporter
13 is okay.

14 MR. NATBONY: Thank you, Your Honor. Two minutes?

15 THE COURT: Two minutes. Two-minute stretch. Okay?

16 (At 4:52 PM, recess was taken.)

17 (At 4:54 PM, proceedings reconvened.)

18 THE COURT: If everybody's ready, you can come back
19 on.

20 MR. NATBONY: Your Honor, I'm just going to wait
21 until I see everybody's picture.

22 THE COURT: Yes. Thank you.

23 Okay. I think we're good.

24 MR. NATBONY: May I proceed, Your Honor?

25 THE COURT: Yes. Thank you.

1 MR. NATBONY: So I had one more issue, and that's
2 relating to documents that govern the HTA bonds. So -- and
3 that is the topic one in Judge Swain's order.

4 So a material issue here is whether the HTA bond --
5 HTA board, I should say, in authorizing the 2002 Bond
6 Resolution intended to be bound by a 2002 security agreement.
7 That agreement was signed by HTA's executive director.

8 And the security agreement is very important, because
9 it goes to the scope of the lien of the excise taxes. In
10 particular, the 2002 documents are important, because the
11 security agreement provides that the security interest applies
12 to monies required to be deposited in the Sinking Fund, as
13 opposed to just monies that actually do get deposited in the
14 Sinking Fund.

15 The government has basically said, no, the 2002
16 Security Agreement was unauthorized by the Board and,
17 therefore, the signature is not valid by HTA's executive
18 director. So Judge Swain responded by authorizing discovery
19 with respect to all documents governing the HTA bonds,
20 including all versions of bond resolutions and documents
21 identifying signatories, and here's the key language, and/or
22 those bound by the bond resolutions.

23 So HTA's files in particular need to be searched for
24 documents showing whether, in connection with the 2002
25 Resolution, HTA's board agreed to be bound by the 2002

1 Security Agreement, which was signed by the executive
2 director. Now, I haven't heard the government say they're
3 going to search HTA files. I've heard them say they're going
4 to look at some central file, which is undefined, of the
5 Commonwealth or GDB's records; but of course that is likely
6 not where the relevant materials are going to be.

7 I think there needs to be a search of the executive
8 director's files. And here, I think the e-mails are relevant,
9 because we need to search the secretary -- I mean the
10 executive director of HTA, and the secretary or person
11 responsible for maintaining the records of HTA's board. This
12 is I think where e-mails are particularly relevant, because
13 they're likely to show the extent of authority and
14 communications with the Board about the security agreement.

15 Now, interestingly enough, the government takes the
16 position that they only have to produce documents relating to
17 older resolutions, like the 1968 and 1998 resolutions, not the
18 2002 Bond Resolution or security agreement. Judge Swain's
19 order does not limit it in that respect. And, in fact, Judge
20 Swain's decision on the Lift Stay specifically addresses this
21 2002 Security Agreement, and, therefore, it is, in fact, now a
22 merits issue that needs to be decided.

23 So all in all, Your Honor, those are the three issues
24 I think that cover what I know of that we have a dispute.
25 It's my understanding the government is willing to provide us

1 with, you know, bank account statements and bank opening
2 documents, and I believe even the vouchers, you know. But the
3 government can correct me if I'm wrong.

4 But, again, these only show the path of the flow of
5 funds, not the why, and not the policies and procedures
6 relating to the flow of funds, which will demonstrate what the
7 institutional views are, and will provide less of an
8 ambiguity, and hopefully resolve for Judge Swain the issue of
9 who has interest in the excise taxes.

10 And for us, we have put in, I think in our proposed
11 order, you know, a limited down and narrowed version of the
12 types of documents that we're talking about. But I do believe
13 that at minimum, with respect to custodians, there should be
14 some meet and confer process.

15 I'll defer to Mr. Langley, if he has anything else on
16 the accounting issue, or Mr. Berezin on HTA.

17 MR. BEREZIN: Your Honor, Robert Berezin for
18 National.

19 The only point I would make is my understanding is
20 that the government is refusing categorically to search for
21 any documents within HTA that relate to Fund 278, which relate
22 to the transfer of excise taxes that were in the TSA recorded
23 in Fund 278. And our view is that that is -- that is
24 completely not compliant with Judge Swain's ruling.

25 So in order to understand fully what HTA -- HTA's

1 policies, HTAs's procedures, what governing accounting and
2 other standards and controls HTA was using, and its
3 understanding institutionally as to whether the funds that
4 were recorded in Fund 278 that were sitting in the TSA
5 actually were HTA's own income, is highly relevant and indeed
6 material to these issues. And a categorical refusal to obtain
7 that information and produce it is, in our view, simply not
8 compliant with Judge Swain's order.

9 THE COURT: Before I have a response, I just want to
10 make it clear that there's been a lot of statements about what
11 you assume Judge Swain can and cannot do or what issues she's
12 raising. My silence on that is not adopting those statements.
13 You know, her order is her order.

14 You filed motions seeking additional discovery where
15 you felt you needed additional discovery. Now we are working
16 off of that order. So I just don't want my silence on that to
17 indicate one way or the other whether I'm adopting your view
18 of what Judge Swain felt was sufficient or was not sufficient.
19 Okay.

20 MR. NATBONY: Your Honor, if I may just say one
21 thing. The First Circuit, when they looked at Judge Swain's
22 Order, did, in fact, interpret the order as requiring a more
23 complete record on these issues. So I just wanted to state
24 that.

25 THE COURT: That will be something that you'll all

1 argue one way or the other.

2 MR. NATBONY: Thank you, Your Honor.

3 THE COURT: I'm just working off of the Discovery
4 Order.

5 MR. LANGLEY: Your Honor, Adam Langley.

6 MR. FIRESTEIN: Your Honor --

7 THE COURT: Who's responding? I'm sorry. I hear
8 voices, but I can't tell who is talking.

9 MR. LANGLEY: Your Honor, Adam Langley on behalf of
10 FGIC.

11 I was going to just address a couple clean-up points
12 on HTA. I think, as Mr. Natbony indicated, a lot of the
13 accounting and auditing issues that were discussed in PRIFA
14 are going to be the same. So the distinction between bank
15 account and fund account is in HTA like it was in PRIFA. And
16 the request for audit documentation, which is at issue again
17 in HTA, I believe if we can agree to the same kind of
18 treatment we did for PRIFA, we can accept that on HTA as well.

19 With any specific records to the excise taxes or
20 disputed revenues in the Commonwealth or HTA's revenues, that
21 would be fair game, and not just broad expanse into the audit
22 documentation but these very targeted issues. And that we
23 would get fund accounts in addition to the bank accounts that
24 they have already provided.

25 If we have that type of agreement on HTA, I don't

1 know that we need to argue a lot, but it's unclear to me
2 whether that is going to be raised distinctly in HTA, apart
3 from how it was presented in PRIFA.

4 THE COURT: Okay.

5 MR. FIRESTEIN: So --

6 THE COURT: Mr. Firestein.

7 MR. FIRESTEIN: Your Honor, it's Michael Firestein.

8 If I might, I'm going to yield to Ms. McKeen and to
9 Ms. Pavel, but I heard what the Court said. But let me just
10 state for the record that the manner in which Mr. Natbony
11 characterizes what Judge Swain did or didn't do, or could or
12 couldn't do, and what the status of the record is, in my mind,
13 a rearguing of summary judgments and a rewriting of Rule
14 56(d).

15 So I recognize that the Court has not -- has stated
16 expressly that its silence is not an adoption of what Judge
17 Swain is or isn't doing. If Your Honor is intending to simply
18 focus on what is or isn't going to be appropriate in discovery
19 and what's tailored and limited, I'll limit my comments and
20 stop there, with one additional observation. But if I need to
21 go into what 56(d) actually means, and what it's about, and
22 how it might affect this, then I would request the opportunity
23 to be heard more.

24 THE COURT: I can promise you my decision will be as
25 short as possible.

1 MR. FIRESTEIN: Perfect. My only other observation
2 is with respect to the claim that somehow accounting treatment
3 matters, or what the Court has done -- I just want to put two
4 flags in the ground relative to this, because there's a
5 considerable amount of discussion concerning Fund 278 and the
6 like.

7 And I fully understand the Court's 56(d) order with
8 respect to exploring documents that govern the flow or that
9 reflect the flow; but I want to cite one case to the Court,
10 and I want to quote one sentence from Judge Swain's Lift Stay
11 Opinion as it relates to the HTA matter, which I think bears
12 on this.

13 The citation is to the *Market XT Holdings* case, which
14 is cited in our papers at page -- at page four; and the quote
15 from that case is, "the manner in which accountants treat
16 transactions is not determinative of dominion and ownership,"
17 which I think is the connection that Mr. Natbony was trying to
18 draw there. I'm not debating what's in Judge Swain's Rule
19 56(d) Order, but I think it has to be said in that context.

20 The other quote is the sentence from Judge Swain's
21 Lift Stay Opinion where she writes at page 28, "the Court
22 rejects" -- "thus, the Court rejects the HTA movant's" -- in
23 this case, it's the Monolines' -- "arguments that are founded
24 in accounting terminology and principles, rather than in law.
25 Such arguments are insufficient to demonstrate that the

1 bondholders have been granted a lien or other property right
2 in revenues beyond those provided by the plain terms of the
3 bond resolutions."

4 It's with this -- in this context and with this
5 background that what Ms. McKeen and Ms. Pavel are going to
6 discuss about what the appropriate discovery is, as we
7 interpret Judge Swain's order, and in the face of Rule 56(d),
8 ought to be addressed.

9 And with that, unless the Court has questions or I
10 have further follow-up, I'll yield to Ms. McKeen.

11 THE COURT: Thank you.

12 Ms. McKeen.

13 MS. MCKEEN: Your Honor, Elizabeth McKeen on behalf
14 of AAFAF.

15 I want to be really targeted and just focus on the
16 categories Mr. Natbony brought up, because I think this is
17 another instance where there's a big disconnect here, because
18 in listening to Mr. Natbony, I think he's sort of glossing
19 over and focusing on all the things that he wants without
20 focusing on all the things that we've said we'll do. So let
21 me take them in reverse order.

22 On the 2002 Security Agreement, I'm hopeful we don't
23 have a dispute here. It's our understanding that the
24 documents that govern the bonds are kept by the office of
25 legal counsel almost exclusively in paper files. We are

1 working with HTA's office of legal counsel to review those
2 paper boxes and to produce any documents that govern the bond
3 documents, including documents governing the executive
4 director's authority to sign the 2002 Security Agreement.

5 Given how these documents are kept, doing a custodian
6 search term type review to find e-mails doesn't make sense,
7 but to the extent the secretary or the executive director of
8 HTA had any materials bearing on these issues, our
9 understanding is that they would have made their way into that
10 file, so that's why we're searching there.

11 So I think on the 2002 Security Agreement issue,
12 we've said we'll look for, and we'll produce what I think
13 Mr. Natbony is looking for. And we're doing that at I think
14 the place he just acknowledged is most likely to have
15 materials like that, which is HTA's files. So that's that
16 issue.

17 With respect to the voucher issue that Mr. Natbony
18 discussed, we have agreed to produce the vouchers. And in
19 fact, he referenced this idea that, you know, there might have
20 been vouchers that were rejected, and that Mr. Ahlberg didn't
21 happen to know at his deposition one way or another whether or
22 not that had actually happened.

23 We are in the process of identifying and collecting
24 vouchers that were submitted by HTA but were rejected by
25 Treasury. And it is our understanding that there are such

1 vouchers. We are locating them, and we will produce them.
2 That is not something that was previously done in the context
3 of the lift stay discovery. We're doing it now. So I think
4 that kind of speaks to that issue.

5 With respect to the sort of more broad Fund 278
6 issues, you know, first of all, just an overarching comment.
7 The Commonwealth has a category in its financial statements
8 for fiduciary funds and lists a bunch of them, and HTA's not
9 included. I think that's just worth noting in light of some
10 of Mr. Natbony's comments.

11 I think the suggestion that communications about Fund
12 278 are going to shed a lot of light here doesn't really make
13 sense, especially when you take a step back and consider the
14 fact that Fund 278 isn't even limited to HTA-related revenues.
15 I think it's helpful to know what we are doing and have agreed
16 to do for HTA.

17 We've already produced accounting documents,
18 including a chart of accounts that map all Commonwealth
19 revenue sources to the fund numbers used for expenses,
20 including mapping for Fund 278. We've produced bank
21 statements for the relevant bank accounts. We are, as we
22 talked about at length today, doing this PRIFAS extract for
23 all the Fund 278 transactions since 2014. And it will include
24 all Fund 278 transactions, not just the HTA ones.

25 We're also updating the flow of funds. We're looking

1 for GASB accounting statements. We're looking for the
2 vouchers I've just described. And we're also looking for
3 policies and procedures or other instructions that govern the
4 accounting treatment and that govern the use of PRIFAS around
5 these issues. We are looking for policies and procedures
6 regarding HTA's requesting of the transfer of and Treasury
7 transferring excise taxes. We are looking for those things.

8 Now, Mr. Berezin suggested that we should be getting
9 accounting-related materials from HTA. That we're not doing,
10 because how HTA did its accounting around these issues, it
11 isn't relevant to what's going on here, which is how did the
12 Commonwealth treat the stuff. We are looking for stuff at the
13 Commonwealth level.

14 We're still going to HTA for things like policies and
15 procedures and other documents, but what we don't want to do
16 is have to do a dump of HTA's own accounting system, because
17 we don't think that's actually within the scope of what the
18 Court contemplated here. So I --

19 THE COURT: I'm sorry. Who else --

20 MS. MCKEEN: No. Please, go ahead.

21 THE COURT: You are looking at HTA's documents for
22 the policies and procedures?

23 MR. MCKEEN: Yes. Yes, Your Honor.

24 THE COURT: Okay. And that would include any
25 limitations or purpose of Fund 278?

1 MS. MCKEEN: Yes, Your Honor.

2 And so, you know, against that backdrop, you know, I
3 want to catch myself before I say I'm agreeing with
4 Mr. Langley, but I do think that, you know, what the Court
5 said about PRIFA earlier is instructive here. I don't think
6 we need to start going through a bunch of e-mails. I think,
7 in the context of PRIFA, what the Court said it would allow
8 with respect to audit-related materials bore very specifically
9 on two statements that were in the Commonwealth's financial
10 statements. Here, I don't think that exists.

11 And what Mr. Langley talked about was, oh, you know,
12 we'll all just be on the same page if we can just get any
13 audit materials that talk about the excise taxes. I know that
14 now then we're going back to this other sort of broad fishing
15 expedition type concept. I think what the Court ordered with
16 respect to PRIFA has no analog with respect to HTA, and that
17 what we are doing with respect to HTA is sufficient to satisfy
18 the Court's order.

19 THE COURT: I will hear from Mr. Langley on this
20 again, just because I don't think that the documents ordered
21 in PRIFA are identical to that that was ordered in HTA. So to
22 the extent that you're saying that there's a comparable
23 request that should be made to the auditors, how are you
24 linking that?

25 MR. LANGLEY: Your Honor, Adam Langley. Was that

1 directed at me to respond?

2 THE COURT: Yes, please. Because, I mean, again, in
3 PRIFA, there was discovery identifying the nature and location
4 of the Infrastructure Fund. That was one of the categories.
5 I'm not seeing a comparable fund, a comparable order for Fund
6 278, which I think was not as disputed as the Infrastructure
7 Fund.

8 MR. LANGLEY: So the key dispute in HTA is who is
9 controlling the revenues. That's the dispute. And they put
10 in their first paragraph bold language in the motion for
11 summary judgment, these are controlled by the Commonwealth and
12 not HTA. Well, that's inconsistent with the financial
13 statements we have seen.

14 The financial statements we have seen have discretely
15 presented HTA separate from the Commonwealth, and they have
16 shown HTA with its own financial statements showing that the
17 revenues are its own income, and not only that, it's own
18 restricted income for the use -- to bondholders at HTA. And
19 that's consistent with fund accounting.

20 And I did want to get back to the fundamentals.
21 There's really four functions of fund accounting, and I think
22 they're blended here. There's bookkeeping, which is journal
23 entries, records, the typical things you think of a
24 bookkeeper. There's internal controls. Those are the
25 governing, the controlling functions that say this has to be

1 done this way, this person does it, this person authorizes it.
2 And then there's a reporting function that aggregates the
3 controls and the bookkeeping into usable reports that people
4 can understand, that management, that Treasury, that HTA can
5 use. And these reports, they're not very helpful to external
6 users. They're brought into the financial statements.

7 So there's a whole system here that then gets audited
8 by the review process and the auditors. So this is not
9 something that's just whimsical or trying to search for
10 anything. There is a very distinct way that these things are
11 set across, and there's a very distinct way that financial
12 statements have presented them.

13 And we think we need to do the tracing of the audits,
14 of the financial statements, the reporting, back through the
15 internal controls to the bookkeeping, which they're saying
16 they're going to give us, which is PRIFAS. So we can't just
17 get PRIFAS, because we won't understand anything. We've got
18 to have the internal controls that they are on, and we have to
19 get the reports to try to make sense of all the stuff that
20 we're going to see.

21 And then it's very helpful for us to see both HTA's
22 auditors, KPMG, as the Commonwealth's auditors, and any
23 internal auditors that have been reviewing these type of
24 documents and making statements and representations as to who
25 owned these revenues. And that's essentially what's at

1 | dispute, who owned these revenues. Was it Commonwealth or
2 | HTA?

3 | And I think we're entitled to get some understanding
4 | as to the controls, to the reporting, and to the audited
5 | documentation that gets into these very, very specific issues
6 | over who owned the excise taxes. That's what we're here for.

7 | So I don't --

8 | MS. MCKEEN: Your Honor --

9 | MR. NATBONY: Your Honor, just to fill in one blank
10 | on your question. In particular, Judge Swain ordered policies
11 | and procedures related to the flow of excise taxes. And we
12 | would assert that such broad language of policies and
13 | procedures related to, would encompass policies and procedures
14 | relating to the accounting -- accounting treatment that would,
15 | therefore, dictate the flow of the funds.

16 | So that would be our position on that, to try and tie
17 | in --

18 | MS. MCKEEN: Your Honor.

19 | THE COURT: Let me go back one second. Ms. McKeen,
20 | I'll let you speak in a second.

21 | MS. MCKEEN: (Nodding head up and down.)

22 | THE COURT: But is Fund 278 reported in HTA's books?

23 | MR. LANGLEY: So, Your Honor, Adam Langley again.

24 | So that's the tricky part with a governmental entity.

25 | A governmental entity has a central government that does a lot

1 of functions for the instrumentalities, and that is what we
2 see here with Treasury. And if you look at the HTA Enabling
3 Act, it actually says the HTA has to consult with the
4 Secretary of Treasury to set up this accounting system and the
5 fund and accounts that are in place.

6 And let me get that cite for you. That's 9
7 L.P.R.A., Section 2008.

8 So there is an interrelation between HTA and the
9 Commonwealth. They are government. They both perform public
10 purposes. They just have distinct purposes. And here we are
11 alleging that revenues were isolated away from the
12 Commonwealth in Fund 278 for the benefit and purpose of HTA to
13 issue bonds to do infrastructure improvements for roads and
14 highways within HTA. So this is a very common structure.

15 I would again point you to our expert report. It's
16 at docket 96. It lays out the specifics of controls and
17 bookkeeping, and why they are all relevant to understanding
18 who owns these revenues.

19 So this is not something that is out of the ordinary.
20 We've got policies and procedures into the excise taxes, and
21 it's very relevant. The outflow and inflow of excise taxes
22 into Fund 278 is relevant. Who owns Fund 278 is very
23 important, where they're coming out of, and where they're
24 going into. So I think this is exactly the question Judge
25 Swain had when she defined these topics.

1 The records regarding Fund 278, that could be HTA.
2 That could be the Commonwealth. It depends on who is right.
3 Is the Board right that it is Commonwealth owned? Are we
4 right that it's HTA owned? We don't know, and we need to be
5 able to explore HTA's records so that we can demonstrate our
6 legal argument is correct. And I think that's what we're
7 trying to do.

8 And I'm a little concerned about Ms. McKeen's
9 statement that they don't want to search HTA, because that's
10 where we think the documents are. That's where we think
11 ownership is. If we don't search HTA, we're not going to get
12 those documents, and we've got the one-sided story that the
13 Board is spinning right now.

14 So I do think it's relevant. I think it's
15 specifically within Judge Swain's orders, and I think it's
16 highly probable that HTA is going to have documents that show
17 that it's own income included these excise taxes.

18 MR. NATBONY: Bill Natbony again, Your Honor.

19 And HTA's own financial statements reflect that.
20 They list the excise taxes as their own income. So in that
21 respect, that would be relevant.

22 THE COURT: Ms. McKeen.

23 MS. MCKEEN: Your Honor, the suggestion that Fund 278
24 is anything other than a Commonwealth fund is particularly
25 absurd in light of the fact that Fund 278 includes non-HTA

1 related revenues, including at one point PRIFA-related funds,
2 which defendants know because they attached a voucher
3 reflecting that very thing to some of their papers in this
4 proceeding.

5 So I just want to suggest that the idea that we've
6 really got to figure out whether Fund 278 is a Commonwealth
7 fund or an HTA fund is not right; but I think the bottom line
8 point is that everything Mr. Langley said makes a hundred
9 percent clear that the answer to your question, does this have
10 an analog in what I ordered for PRIFA, is no. There is no
11 analog.

12 What he just described is the same incredibly
13 overbroad kind of fishing expedition into audit-related stuff
14 that you concluded two hours ago wasn't appropriate in PRIFA,
15 and it's not appropriate here for the same reason.

16 MR. NATBONY: Your Honor, Bill Natbony.

17 MR. FIRESTEIN: Can I -- I'm sorry. Do I get a turn?

18 THE COURT: Wait. Mr. Firestein.

19 MR. FIRESTEIN: Thank you, Your Honor. Michael
20 Firestein again.

21 When I started my comments a couple of hours ago, I
22 referenced some things in the HTA 56(d) declaration, and now
23 we're coming full circle back to exactly what's in there, and
24 how they are trying to, for lack of a better way of putting
25 it, run a moose through a mouse hole.

1 In Mr. Servais' HTA 56(d) declaration, he asked
2 specifically, amongst a whole host of other matters, documents
3 and testimony explaining the Commonwealth's accounting
4 practices, including the use of fund accounting, GAAP, and
5 GASB principles. Apart from the fact of what Ms. McKeen said
6 is being produced, that's nowhere in this. But more important
7 to this is the bullet point that I raised earlier, which says,
8 documents provided to and communications with the Commonwealth
9 and HTA auditors related to their definition of pledged
10 revenues, including work papers, engagement letters, tie outs,
11 support for financials, and any explanations provided to
12 auditors concerning the Commonwealth's treatment of the
13 pledged revenues.

14 There is nothing remotely like that in the categories
15 that were identified by Judge Swain in connection with HTA.
16 There's no source in existence -- or origination of the
17 Infrastructure Fund. There's this notion of policies and
18 procedures relating to the flow of excise taxes, not their
19 accounting treatment, which, contrary to Mr. Langley's
20 statement, is an expression that's contrary to law as it
21 relates to dominion and ownership.

22 And what HTA might say in its financial statements,
23 irrespective of the notion that there is one government, all
24 right, which we all understand, nonetheless, HTA is a separate
25 public corporation. And this is an action brought by the

1 Commonwealth, and these are funds that are raised through the
2 Commonwealth's taxing authority.

3 And the question is what is happening at the
4 Commonwealth, and whether, you know, the bond resolutions or
5 the statutes create an ownership interest or some other
6 security lien in favor of these bondholders, which Judge Swain
7 has already concluded, in connection with the lift stay, it
8 does not. But to then go fish into HTA as to how they think
9 the Commonwealth may have addressed it is -- frankly, pushes
10 the envelope, to mix my metaphors, a bridge too far.

11 MR. NATBONY: May I respond briefly?

12 THE COURT: I have to say I'm not sure that how HTA
13 understood its control over these funds is irrelevant to this
14 case.

15 MR. FIRESTEIN: Is relevant or irrelevant?

16 THE COURT: I don't think it is irrelevant is what I
17 said. But I'm not sure the appropriate way to find it --

18 MR. NATBONY: Your Honor, may I just say a few brief
19 things in response to what I heard?

20 THE COURT: Yes.

21 MR. NATBONY: Thank you, Your Honor.

22 So, first of all, with respect to Mr. Firestein's
23 comments, I should note that it is relevant, because with
24 respect to HTA, Judge Swain basically has determined that the
25 documents and the bond documents do need further

1 interpretation, you know, with respect to what the parties saw
2 as who owns these funds.

3 And while the Commonwealth may have one view, and --
4 if the HTA has a different view, those different views may be
5 based on documents. They may be based on representations. So
6 HTA's view, institutional view, I think is highly relevant.

7 And also, with respect to the comment that was made
8 about Fund 278 not being limited to HTA revenues, I think
9 Ms. McKeen is being technical, but let's be clear. There are
10 particular subaccounts in Fund 278 that specifically deal with
11 and only deal with the excise taxes. And there's a specific
12 subaccount in Fund 278 for every one of the excise taxes, and
13 they are actually designated with a number that relates to
14 HTA.

15 So, and frankly, you know, I'm not looking for things
16 that are not related to HTA, but to say that Fund 278 has
17 other accounts, there may be other special revenue accounts.
18 We're dealing with HTA. And there are specific subaccounts in
19 Fund 278 for each of the excise taxes.

20 THE COURT: Ms. McKeen.

21 MS. MCKEEN: So, Your Honor, I guess the main point I
22 want to respond to there is that on this idea that HTA's view
23 is relevant, I guess we just disagree with that, because I
24 don't think what HTA's view is or isn't would change rights or
25 obligations vis-a-vis the Commonwealth itself.

1 That having been said --

2 THE COURT: That may be ultimately the legal
3 conclusion, but I'm not sure for discovery that --

4 MS. MCKEEN: Well, fair enough, Your Honor. And
5 that's why we haven't taken the position that we're not going
6 to talk to HTA. Right. Like we are looking through HTA's
7 files, for example, for all the kinds of things that I
8 described with respect to the 2002 Security Agreement, with
9 respect to other documents, policies and procedures. My only
10 point in making that statement was that the accounting related
11 information that we are providing will come from PRIFAS, not
12 from HTA's own internal accounting system.

13 So that's the --

14 THE COURT: I don't see a problem with that.

15 I guess, Mr. Langley, do you see a problem with that,
16 just to the accounting?

17 MR. LANGLEY: Well, I guess my answer is I don't know
18 what's there, because we haven't been told anything. And if
19 we had been told how this PRIFAS worked, or what reports and
20 controls are in place, who operates these controls, we could
21 answer the question; but we haven't been told that.

22 So I think to the extent that we can get an
23 understanding, it's very clear as to who operates these
24 controls, what is the flow through the funds, not the
25 accounting -- excuse me, not the bank accounts, I think we can

1 get a very clear picture as to what we need. And this is not
2 something that's going to be a fishing expedition. It is
3 simply we don't have the information up front to be able to
4 answer straight forward questions.

5 MR. BEREZIN: Your Honor, Robert Berezin for
6 National. If I could just be heard on this point?

7 THE COURT: Sure.

8 MR. BEREZIN: There's a distinction in Judge Swain's
9 topics between documents reflecting the flow of funds,
10 including through Fund 278, which is what the PRIFAS printout
11 will be, and the other topics. And in particular, your
12 question on the relevance of HTA's view, Judge Swain
13 specifically granted discovery on documents concerning the
14 extent to which excise taxes were or have been made available
15 to HTA.

16 So if you're at HTA, and you've got policies and
17 procedures that basically say you can get Fund 278 money
18 whenever you want, again, Fund 278, the subaccounts that are
19 HTA, as Mr. Natbony noted, that's going to be highly relevant.
20 So it's the policies and procedures, that kind of information
21 should be readily available and accessible, as well as their
22 side of the transfer discussion, because that's going to shed
23 light on what Judge Swain wanted to know, which is were
24 those -- were those excise taxes recorded in Fund 278 made
25 available to HTA. That's one of the factual disputes that we

1 have.

2 THE COURT: Well, as I --

3 MS. MCKEEN: Your Honor.

4 THE COURT: Yes, Ms. McKeen.

5 MS. MCKEEN: Your Honor, I just want to -- in
6 response to that, Mr. Berezin sort of paraphrased the order on
7 that issue, but he didn't quote it. What it says is,
8 "documents concerning the Treasury's role in the approval of
9 transfers to HTA, and the extent to which excise tax revenues
10 were or have been made available to HTA."

11 That is a Commonwealth side inquiry, not an all
12 documents concerning what all the parties thought about these
13 things inquiry. So the text of the order makes this clear,
14 that this is about Treasury's role and what the Commonwealth
15 did, not what HTA thought about it.

16 THE COURT: I'm reading it the same way as you are,
17 and I am also hearing that records reflecting the flow of
18 funds in and out are going to be Commonwealth -- the PRIFAS --

19 MS. MCKEEN: Correct.

20 THE COURT: -- accounting. So that makes sense to
21 me, but I do think, and as you've answered already, that the
22 policies and procedures relating to the flow of funds -- you
23 are searching the HTA documents for those?

24 MS. MCKEEN: (Nodding head up and down.)

25 THE COURT: And for I am assuming restrictions on the

1 use of funds, and an understanding of what this Fund 278 is or
2 HTA's role in -- sorry. I do think it is significant for
3 discovery purposes what HTA believed its rights and
4 obligations were with respect to these funds. Okay. Whether
5 or not it's ultimately controlling on the issue of summary
6 judgment is a different issue, but I do think for summary
7 judgment that it is significant what HTA did.

8 It sounds to me, though, that a big part of this
9 dispute is, again, where is the search being done, and there's
10 been -- there's a need to have that more fully explained,
11 along with, frankly, the defendant's ability to make
12 suggestions.

13 MS. MCKEEN: Your Honor, I would certainly intend
14 that we would provide the same kinds of information for HTA,
15 and for CCDA as well, that we mentioned earlier today about
16 providing for PRIFA. I think it's equally applicable across
17 all three as far as the concept, and we will do that.

18 THE COURT: All right. I do think that the defendant
19 should have the opportunity of making suggestions, which you
20 can then fight about later or accept.

21 MS. MCKEEN: We are all on one another's speed dial,
22 so we can confer.

23 THE COURT: I would imagine.

24 What I'm not sure of and where I'm a little lost on
25 is whether we need an auditor -- if audit papers add anything

1 to this in any way. I'm not -- I'm thinking that maybe it's
2 an interrogatory. I'm thinking maybe it's a deposition. But
3 I'm not sure where the audit papers would come in.

4 MS. MCKEEN: I think that's right, and here's why. I
5 think what you ordered earlier with respect to PRIFA had a
6 very limited scope and a clear relation to a statement that
7 was made in a financial statement and the desire to understand
8 more about the identity of the Infrastructure Fund. That
9 doesn't exist in the same way in HTA. And I think a lot of
10 what we've heard today that is desired is an explanation of
11 why something was done in a certain way. And I think when you
12 look at what is targeted, efficient, limited, and
13 proportional, you are exactly right, that it's to ask that
14 question of a person who knows the answer. And that's what I
15 would say that we ought to do.

16 And I of course would anticipate that down the road,
17 if after our document production is complete, if after a
18 30(b)(6) witness can't answer a question like that, you would
19 certainly hear from defendants about it; but I don't think
20 that means we need to assume that things won't go the way they
21 are, which is that when defendants ask us those kind of
22 questions, we'll be able to give them answers. And I think
23 that is the most efficient approach at this point, rather than
24 opening the door to all the kinds of audit materials that have
25 been described today, that you didn't find appropriate to

1 order in PRIFA.

2 MR. BEREZIN: Your Honor, could I just address that
3 briefly?

4 THE COURT: Yes.

5 MR. BEREZIN: Robert Berezin. This is Robert Berezin
6 for National.

7 There are two specific statements that were made in
8 the financials, audited financials about the Fund 278
9 subaccounts, about the excise taxes in particular. And so
10 there is an analogy. At a minimum, we should get the audit
11 papers that relate to those specific statements, which we can
12 identify to the government parties. The one that was
13 referenced --

14 THE COURT: Give me a clue. Give me a hint as to
15 what it says.

16 MR. BEREZIN: Sure. One was referenced by
17 Mr. Langley, that the Fund 278 revenues were treated as HTA's
18 own income, quote, unquote. So we clearly -- there is a basis
19 for that. We'd like to see what the basis is.

20 And then there are statements in the Treasury, the
21 various Treasury single account statements. But there's one
22 in particular that appears that we can -- that is
23 representative, that we can also ask them for the support for
24 that.

25 MR. LANGLEY: Your Honor, this is Adam Langley again.

1 To address the specifics in the financial statements,
2 so, as an example, and as Mr. Berezin says, there are a number
3 of statements specifically about the excise taxes and how
4 they're accounted for in the financial statements. But this
5 is from the 2010 financial statements. It says, the
6 Commonwealth pledged -- and I'm going to paraphrase to get rid
7 of some of the wordiness, but the Commonwealth pledged
8 gasoline excise taxes, diesel oil excise taxes, and motor
9 vehicle license fees for the repayment of PR HTA Revenue
10 Bonds. And that's not HTA. There's a separate statement HTA
11 pledged it. That's that the Commonwealth pledged these
12 revenues to the repayment of the HTA bonds. That's a pretty
13 specific statement in the financial statements that are
14 audited.

15 So that's the type of information that we think is
16 highly probative to the very questions before this Court on
17 whether the Fund 278 is owned by the Commonwealth or HTA. And
18 I ask for discovery into that.

19 MR. NATBONY: If I may add to that, in the 2015
20 Commonwealth -- Bill Natbony again, Your Honor.

21 From the 2015 Commonwealth financials, again, the
22 Commonwealth financials say, at pages 30 and 31, certain
23 revenues, such as federal excise taxes -- and then I'm dot,
24 dot, dotting -- which are conditionally allocated to HTA, a
25 discretely presented component are not included as revenues

1 for the purpose of calculating the debt limit, although they
2 may be available for the payment of debt service.

3 So why did that language change? Just like in
4 PRIFA, when the language changed from 2010 here to 2015. So
5 there are similar issues.

6 THE COURT: Ms. McKeen, they're convincing me that
7 there should be a limited inquiry to the auditors under the
8 policies and procedures as to how the Fund 278 revenues with
9 respect to HTA should be treated, if there were instructions
10 there.

11 MS. MCKEEN: I think this -- what they're asking for
12 is still very different than what was at play in PRIFA,
13 because in PRIFA, you're trying to -- obviously we disagree,
14 you know, but my understanding of what's going on in PRIFA is
15 that we're trying to resolve a factual issue about what is
16 this Infrastructure Fund.

17 Here what I've heard are statements that the parties
18 are going to have a lot of different takes on what the legal
19 effect of those statements is, but I'm less certain about what
20 the factual issue that is sought to be resolved there is. I
21 think to the extent the Court is inclined to order something
22 on this point, I heard Mr. Berezin say that he had two
23 statements that he wanted us to investigate. One he shared
24 with us. One he hasn't. Then I heard other statements from
25 other people.

1 And so I think it's hard for us to respond about why
2 audit-related work papers are or aren't appropriate to sort of
3 flesh out issues and statements that we still haven't heard
4 what they all are yet. You know, if the parties would meet
5 and confer about this issue while we're going through the
6 process of figuring out a proposed order on PRIFA, you know, I
7 suppose we could meet and confer about it. But it's hard for
8 me to respond why audit papers aren't appropriate for a
9 specific statement that Mr. Berezin hasn't told me.

10 I think the more overarching issue, though, is this
11 just isn't the same as what you ordered with respect to the
12 Infrastructure Fund. And I don't think we need auditor work
13 papers back and forth to get at what the key issues are.

14 I don't know, Mr. Firestein, if you'd like to be
15 heard on this issue, but --

16 THE COURT: Mr. Firestein, before you speak, what I'm
17 envisioning is more of something in the form of instructions
18 to the auditors, which end up reflected in these notations,
19 but I'm trying to figure out the most efficient way of doing
20 that. In my mind, and I could be totally wrong, but in my
21 mind, the auditors' papers are easier to search than searching
22 the Commonwealth papers to get to a very specific answer.

23 MS. MCKEEN: Well, and, Your Honor, I appreciate that
24 the extent to which your focus is on, you know, were there
25 instructions, I think, again, I don't want to beat a dead

1 horse, but I want to make sure that anything that's
2 contemplated on this doesn't become the "all documents
3 relating to" or "concerning" exercise.

4 I think we have to -- if there's going to be
5 discovery on an issue, we have to be really clear about the
6 scope and the limitations, so that it doesn't snowball.

7 MR. LANGLEY: Your Honor, this is Adam Langley again.

8 I'd like to propose what I think could get us to a
9 very targeted response, and that is to identify the excise
10 taxes. That is the disputed revenue source. That should be
11 discretely carried off in either HTA's or the Commonwealth's
12 financials and audit papers.

13 So we're not asking for significant exploration --
14 we'd have to go through and identify each statement in the
15 financials that identifies those excise taxes. And we could
16 do that, but I think the simpler answer is, we're targeted on
17 the excise taxes. It's a discrete revenue source for both the
18 Commonwealth and HTA financial statements. The auditors can
19 tell us very quickly what documents they have on the excise
20 taxes.

21 MR. FIRESTEIN: I'm sorry, Your Honor. Michael
22 Firestein again.

23 That actually sounds more like a backslide more than
24 anything else, which sounds frighteningly familiar, to
25 identifying the Infrastructure Fund, which is not a subject

1 that we have here as it relates to the excise taxes. We know
2 what the excise taxes are.

3 And I want to echo one thing that Ms. McKeen said.
4 The fact of the state -- there is a legal debate about the
5 consequence of the change, but the fact of the change,
6 assuming it to be true, in my mind, I say sort of so what.
7 The fact that, you know, if it ends up being restricted to an
8 instruction by a client, and I would limit it to the
9 Commonwealth, but if the Court is going to say HTA, to its
10 auditors, to say do this with that, and it's part of the
11 compilation of audit work papers that the only gentleman who's
12 an accountant on this call, Mr. Langley, seems to think -- or
13 I guess Ms. Miller said the same thing, that they are sort of
14 neatly put together.

15 And we've all had our dealings with auditors over the
16 years. That's one thing. But I want to be careful or make
17 sure that we all are very careful of the timing, and how this
18 can mushroom into communications, and who said what to whom.
19 And then we've got e-mail searches.

20 So, you know, I keep hearing the words out of Your
21 Honor's mouth that strike me as being very structured and
22 rigid with respect to the targeted search, but every time I
23 hear comments coming back from the defendants, I'm concerned
24 that we have a different view, or they're trying to push the
25 envelope a little bit farther. And after us chatting about it

1 for a few days, we'll come back with differing orders anyway,
2 and I just want to make sure that we get express clarity on
3 this.

4 THE COURT: -- period that is of critical importance
5 here.

6 MR. FIRESTEIN: I'm sorry, Your Honor. Your first
7 couple of words skipped out. Could you just start again? I'm
8 sorry.

9 THE COURT: Would it be appropriate to say
10 instructions from 2014 forward?

11 MR. NATBONY: Your Honor, if I may be heard just
12 briefly. Bill Natbony again for Assured.

13 I mean, if there's a communication -- and my fear is
14 that, how do you interpret the word "instruction." And I
15 don't want it to be so limited so it doesn't include, for
16 instance, a communication that might say something like this:
17 Please don't say that in the audited financial statements. We
18 don't want to admit that these funds belong to HTA.

19 Would that be an instruction --

20 THE COURT: If it's not a policy and procedure,
21 you're not going to get it, so I would suggest that --

22 MR. NATBONY: No, but --

23 THE COURT: -- you don't keep expanding on what you
24 want --

25 MR. NATBONY: -- the Order also says all documents

1 governing the flow of funds, so if someone is saying, don't
2 call it that but move it there, put it in Fund 278, don't call
3 it that so it won't be moved there, that would be relevant.

4 THE COURT: If there are statements that describe
5 the -- no. Actually, I'm going to take that back, because
6 it's records reflecting the flow of funds. That's a fact.

7 MR. NATBONY: That's the first one I was talking
8 about, the first one, Your Honor, all documents governing --

9 THE COURT: Governing the bonds. Governing the
10 bonds, including origins of the bond resolutions and documents
11 identifying the signatories to and/or those --

12 MR. NATBONY: I think -- that says all documents
13 governing the flow of excise taxes -- my apologies for
14 steering you to the first one, Your Honor. So it's not only
15 reflecting -- that's the whole point. It's not just where.
16 It's why and how.

17 THE COURT: Well --

18 MR. FIRESTEIN: Obviously -- Your Honor, it's Michael
19 Firestein.

20 We have a very different view on what the definition
21 of governing is. If only I could send an email to my
22 executive committee and tell them what I think should be done.
23 That hardly constitutes something that governs the flow of
24 anything or a determination on anything. And I think Your
25 Honor expressly described that in the original lift stay

1 discovery proceedings where someone writing and sending an
2 e-mail to someone else doesn't contribute to the meaning of
3 anything.

4 THE COURT: Correct, but the Board's vote on that
5 would. So I'm looking for the right file that has that
6 instruction that says these funds are to be treated in such
7 and such a way, and I don't know where the best place is. My
8 sense is that the best way -- if the Commonwealth came and
9 said, look, here's our legal file, here's our auditor file, we
10 keep copies of every instruction that we give to the auditors,
11 I would tell you that's the place to look; but I'm not hearing
12 from you that that's how the files are kept.

13 So I do think that instructions to the auditors, as
14 to the -- I am assuming that the auditors are recording how
15 the funds are being used to some extent; is that right?

16 MR. LANGLEY: Your Honor, this is Adam Langley again.

17 So it's close. So what is happening is actually
18 Treasury and the Commonwealth are making representations to
19 the auditors, and the auditors are going and testing those
20 representations. So they would actually say what the
21 instructions are, and how these monies are owned; and then the
22 auditors go and test that to make sure there's supporting
23 evidence, and evaluate those controls and those policies and
24 procedures to make sure what the Commonwealth and Treasury is
25 saying are accurate.

1 So that is what we're trying to get at, to get down
2 that road. And we don't know what that road's going to lead
3 to. We have to go down that road to get there.

4 THE COURT: Well, somewhat, because we have to get
5 back to what the original question is, right, which is, who
6 has control over these funds? And not nine million other
7 possible threads --

8 MS. MCKEEN: And, Your Honor, I think, just taking a
9 step back, the idea that we need these documents to figure out
10 who has control of these funds we don't agree with, and that's
11 what this whole idea of this voucher discovery process is
12 about. I think the vouchers and, in fact, the rejected
13 vouchers will reflect that there were times that, you know,
14 HTA submitted a voucher that Treasury rejected. That's
15 entirely inconsistent with the idea that HTA just had free
16 reign over this stuff.

17 And so I understand the Court's desire to make sure
18 there's discovery on the issue of who controlled these funds.
19 I think that's already being provided. I think the idea that
20 we have to be looking at communications to auditors, we just
21 don't agree with that.

22 THE COURT: I --

23 MS. MILLER: Atara Miller. If I can, on this --
24 Atara Miller from Milbank.

25 You know, Ms. McKeen makes a good point, but in some

1 ways, it highlights exactly what you would expect to see in
2 the audit materials, because if a venture is rejected by
3 Treasury because one of Treasury's functions is ensuring that
4 HTA is itself complying with the restrictions that are placed
5 on the funds, and the requisition request for a transfer of
6 money was for a purpose that was inconsistent, the voucher
7 would just tell us, hey, you know, request for transfer of
8 money's rejected. It wouldn't necessarily explain why was it
9 rejected.

10 But the audit materials might actually include or
11 would include the description that includes the controls and
12 the restrictions that are placed on those funds. And so,
13 actually having both pieces would be the only way to really
14 understand what's going on.

15 THE COURT: I'm not opening up all of the discovery
16 into all of the audit papers to support HTA --

17 MS. MILLER: I'm not -- I wasn't suggesting that, but
18 I do think that there are some key components, if you focus in
19 on specific statements and representations that are contained
20 in the audited financials, and you have the audit file backing
21 that up. It seems pretty narrow and directed, and it might
22 go -- it might answer a lot of other questions and avoid
23 subsequent steps on the vouchers and other things like that.

24 MR. NATBONY: And, Your Honor, it's Bill Natbony.

25 To the extent that you limit it to instructions or

1 representations based on what was set forth in the financial
2 statements about the excise taxes, you are kind of combining
3 the two and limiting it.

4 THE COURT: So I think it makes sense to have the
5 defendants identify the statements that you want, similar to
6 PRIFA, identify those statements and see if there are
7 instructions, explanations, instructions in the audit papers
8 to explain the basis of those actions. All right?

9 I'm assuming it's going to be a reasonable list of
10 questions.

11 MR. BEREZIN: (Nodding head up and down.)

12 THE COURT: I've heard two so far. My guess is when
13 it's done, there will probably be more, but let's leave it
14 under five, unless you have to convince me way otherwise.

15 And, Ms. McKeen, if you find that there are HTA files
16 or Commonwealth files that would have that information, as
17 opposed to doing it via the audit papers, have that
18 conversation.

19 MS. MCKEEN: Yes, Your Honor.

20 THE COURT: I'm not wedded to the audit papers. I'm
21 trying to figure out the best way to get the information, if
22 there were instructions to the auditors on how to handle the
23 reporting.

24 MS. MCKEEN: Understood.

25 THE COURT: Okay. Are we done?

1 MR. BEREZIN: (Nodding head up and down.)

2 MS. MILLER: So, Your Honor, this discussion -- I'm
3 sorry. Atara Miller from Milbank.

4 Just one small issue, and actually our ask hopefully
5 is one that is non-controversial. I say that, you know, pray
6 -- things may always change, but you had asked Ms. Pavel at
7 some point whether there were -- whether it was possible to
8 run a list of potential reports. And she explained that
9 they're querying the accounting system, and they would look
10 into, you know, whether there are, you know, off-the-shelf
11 reports.

12 I'm not sure we need a list of off-the-shelf reports
13 that the Commonwealth regularly runs, but we did in our
14 proposed order ask for a meet and confer over potential
15 additional reports. Once we see the information that they are
16 providing to us, and I think this goes to the point that, you
17 know, we have to trust them, and we are trusting them to some
18 degree, but to the extent there are additional fields or
19 additional materials that we think are necessary, we just want
20 to make clear that we still have that request to at least talk
21 about the possible -- whether there are additional reports
22 that possibly could be run.

23 I haven't seen the reports. I don't think they've
24 even been produced yet. And, also, I'm not saying that there
25 will be requests, but it's, again, a little bit of this

1 unknown black box. And so we're happy to take what they think
2 is the best information; but if there are gaps, we do want to
3 make sure that we can at least have a process for talking
4 about it, and getting some information about the PRIFAS
5 system, and what reports could be run or what information
6 could be extracted from it.

7 THE COURT: -- into there about --

8 MS. MCKEEN: I want to make sure -- I just want to
9 make sure we're not talking past each other. I want to make
10 sure I understand the ask.

11 THE COURT: I think the ask is you can make custom
12 designed reports, and the defendants want the opportunity to
13 suggest some if they think some are appropriate. And you have
14 the opportunity to say no.

15 MS. MCKEEN: I certainly -- so I'm probably the wrong
16 person to ask about the technical capabilities, but it
17 certainly sounds like something that we ought to be able to
18 meet and confer about.

19 THE COURT: Okay.

20 MS. MILLER: And I think maybe more specifically,
21 meet and confer about what the technical capabilities are. So
22 we understand there isn't a list of reports, but if what we
23 have isn't sufficient for certain components, we'd like to
24 know is it even possible.

25 And sort of along the lines of the questions that we

1 asked at the last 30(b)(6) that sort of lead to the
2 Commonwealth running these reports, we'd like to be able to
3 front end it and not save it, ask it at the deposition, and
4 then be out of time to actually get the information that we
5 would want, which is what happened last time.

6 MS. MCKEEN: So nothing about that strikes me as
7 unreasonable. My suggestion would be that we provide
8 defendants with the materials that we were working on putting
9 together, and that once you have them, you know, we discuss,
10 hey, is there some other ex -- you know, field or data point
11 or something else you'd expect to see in here. Let's talk
12 about what that might be and if it's doable, and if it's not,
13 why it's not. And that kind of stuff.

14 I think that makes sense, and I don't see any reason
15 why we shouldn't be doing that.

16 THE COURT: I think that that makes sense at this
17 juncture. You know, I think the luxury of sort of the
18 exploratory, what systems exist, is unfortunately not timely.
19 So I think it makes sense to get -- see what's going on. If
20 there are certain reports or fields or whatever that the
21 defendants think would be helpful, I think it is appropriate
22 to meet and confer on those.

23 MS. MILLER: I think we're all in agreement, which
24 may be the only time ever with this group, so I think that
25 this may be a great place to stop.

1 THE COURT: So that sounds good. How about by
2 Friday? Is that still doable? Or we can wait until Monday if
3 you want to submit a proposed order, Monday close of business?
4 Is that better?

5 Now people are freezing on me? Now people are
6 freezing on me.

7 MS. MCKEEN: -- helpful --

8 THE COURT: You started to move.

9 MS. MILLER: Ms. McKeen, you cut out.

10 MS. MCKEEN: Oh, I'm sorry. Can you hear me now?

11 THE COURT: Yes. Sorry.

12 MS. MCKEEN: Your Honor, to the extent things are a
13 little more broad than they were when I made the Friday
14 comments, I think having some additional days would be helpful
15 to all the parties.

16 THE COURT: Monday? Tuesday? I leave it to you.
17 Work together. If you can't agree, though, by Tuesday, send
18 me your different proposals, and I'll just rule on it.

19 MS. MCKEEN: Yes, Your Honor.

20 MR. FIRESTEIN: Your Honor, Michael Firestein.

21 I think that's fine. I think the parties here are
22 pretty sophisticated and have a sense as to what in the
23 meantime needs to be done. And if we end up arguing over the
24 order, so be it, you know.

25 So I think maybe if it's Tuesday by five o'clock

1 Atlantic, if there isn't a joint order to be submitted, then
2 whatever the nature of the dispute is -- the only thing I
3 would like to avoid, and maybe I speak on behalf of everyone,
4 is the less we have to sort of put together, status report --
5 you know, it behooves us all to agree, but it also takes time
6 that might be taken away from other things, right, in terms of
7 complying with discovery and the like. So --

8 THE COURT: If you don't agree, I don't need an
9 explanation. Just submit what you think is appropriate. I
10 know what I intended to order.

11 MR. FIRESTEIN: That in and of itself is helpful.

12 THE COURT: Is that surprising?

13 MR. FIRESTEIN: No. No. No. No. Everything the
14 Court -- listen, not to suck up, but everything the Court says
15 is helpful. But I think, for the benefit of everybody, they
16 sort of collectively wipe their brow relative to that. There
17 have been some late nights on some of these submissions.

18 THE COURT: No, and I do know they are difficult. I
19 mean, the devil is always in the detail, but it would be
20 helpful to me to see what you -- if you can agree on it.
21 Close of business Tuesday is fine. The beauty of it is that
22 all our times are in the same time zone now, so I don't have
23 to guess if we are doing it at 8:30 in the morning or 9:30 in
24 the morning. We are all in the same time zone.

25 So do that by close of business on Tuesday, and,

1 again, I don't need an explanation if you don't agree. Just
2 give me what you have.

3 MR. FIRESTEIN: Thank you.

4 MS. MILLER: Thank you, Your Honor.

5 MR. NATBONY: Thank you, Your Honor.

6 THE COURT: Then, also, I'm not altering the schedule
7 at all. We have -- built into the schedule was another status
8 report and another conference if we needed it down the road I
9 believe.

10 MR. FIRESTEIN: Is that right, Your Honor? I don't
11 mean to --

12 THE COURT: I wrote it down. Here we go. A joint
13 status report with discovery disputes by April 16th. Final
14 status conference April 23rd.

15 MR. FIRESTEIN: So be it.

16 THE COURT: I have it. I'm sticking with it unless
17 somebody tells me we have a major crisis between then and now.
18 Okay.

19 MR. BEREZIN: Now --

20 MR. FIRESTEIN: Good to go.

21 THE COURT: I'm not going to ask if there's anything
22 else, because that's a very open question. I'm just going to
23 say good-bye.

24 MR. FIRESTEIN: Be safe. Have a good night.

25 MS. MILLER: Good-bye.

1 MR. NATBONY: Thank you, Your Honor. Be safe.

2 THE COURT: Thank you, everyone.

3 (At 6:01 PM, proceedings concluded.)

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1 U.S. DISTRICT COURT)

2 DISTRICT OF PUERTO RICO)

3

4 I certify that this transcript consisting of 146 pages is
5 a true and accurate transcription to the best of my ability of
6 the proceedings in this case before the Honorable United
7 States Magistrate Judge Judith Gail Dein on March 17, 2021.

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11 S/ Amy Walker

12 Amy Walker, CSR 3799

13 Official Court Reporter

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